83-534

Office-Supreme Court, U.S.
FILED
SEP 27 1983
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

CURTIS FARBER, APPELLANT

V.

STATE OF OREGON, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF OREGON

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the admission of the statements of a co-conspirator, pursuant to former ORS 41.900(6), violated the Appellant's right of confrontation, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, when the reliability of such evidence was highly suspect, and its impact was devastating to the Appellant's defense?

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JURISDICTIONAL STATEMENT

Curtis Farber, the Appellant, appeals from the final judgment of the Supreme Court of Oregon, dated June 29, 1983, holding that Oregon Revised Statute (hereinafter referred to as ORS)41.900(6), allowing a hearsay exception for statements of a co-conspirator, did not violate the Appellant's right to confront witnesses as guaranteed by Sixth and Fourteenth Amendments to the Constitution of the United States in general, and as applied to the facts of his case.

PARTIES TO THE PROCEEDING

The Appellant, Curtis Farber, and the Respondent, State of Oregon, as listed in the caption of the case, are the only interested parties to this appeal.

OPINIONS BELOW

The Opinion of the Supreme Court of Oregon, included in the appendix at A-34 - A-49 is reported at 295 Or 199, 666 P2d 821 (1983).

The Second Opinion of the Court of Appeals of the State of Oregon included in appendix at A-20 - A-33 , is reported at 59 Or App 725, 652 P2d 372 (1982)

The First Opinion of the Court of Appeals of the State of Oregon, included in the appendix at A-1 - A-19 is reported at 56 Or App 351, 642 P2d 668 (1982).

GROUNDS FOR JURISDICTION

The Opinion of the Supreme Court of Oregon, affirming the appellant's criminal conviction, was filed on June 29, 1982. A Notice of Appeal to this Court was duly filed in the Supreme Court of Oregon on August 19, 1983. This appeal is being docketed in this Court within 90 days of

the date of the Opinion of the Supreme Court of Oregon. The jurisdiction of this court is invoked under 28 USC §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution reads as follows:

AMENDMENT VI

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section 1, reads as follows:

AMENDMENT XIV

Section 1. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Former ORS 41.900(6) reads as follows:

> Evidence may be given if the following facts ....
>
> (6) After proof of a conspiracy, the declaration or act of a conspirator against his co-conspirator, and relating to the conspiracy.[1]

[1] Former ORS 41.900(6) has now been superseded by Rule 801(4)(b)(E) of the Oregon Evidence Code, which reads as follows:

> (4) A statement is not hearsay if:....
>
> (b) The statement is offered against a party and is:....
>
> (E) A statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy."

STATEMENT OF THE CASE

NATURE OF PROCEEDINGS BELOW

This matter is a criminal case in which the appellant was charged with murder, in violation of ORS 163.115(1)[2].

[2] ORS 163.115(1) reads in pertinent part as follows:

"(1) Except as provided in ORS 163.118 and 163.125, criminal homicide constitutes murder when:

(a) It is committed intentionally by aperson who is not under the influence of an extreme emotional disturbance;

(b) It is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit any of the following crimes and in the course of and in furtherance of the crime the person is committing or attempting to commit, or during the immediate flight therefrom, the person, or another participant if there be any, causes the death of a person other than one of the participants:....
(Lists various crimes not applicable to this case.)

After a trial to a jury, he was convicted and sentenced to mandatory life imprisonment.

The case was appealed to the Oregon Court of Appeals, which initially reversed the conviction on the grounds that the appellant's Constitutional right of confrontation had been violated through introduction of hearsay statements of a co-conspirator. (State v. Farber, 56 Or App 351, 642 P2d 668 (1982))

The State then filed a Petition for Review to the Supreme Court of Oregon. Such Petition initially triggers reconsideration by the Court of Appeals. In this instance they did reconsider their prior opinion and issued a subsequent decision which affirmed the conviction, but remanded for resentencing. (State v. Farber, 59 Or App 725, 652 P2d 372

(1982)

The appellant then filed a Petition for Review with the Supreme Court of Oregon. The Court of Appeals, again given the opportunity to reconsider, declined to do so, and the Petition was then forwarded to the Oregon Supreme Court. It accepted review of the matter and issued an opinion affirming the Court of Appeals' second Opinion, and thus affirming the conviction. (State v. Farber, 295 Or 199, 666 P2d 821 (1983))

The Appellant then filed a Notice of Appeal to this Court.

RAISING THE FEDERAL QUESTION.

Appellant objected at trial to the admission of any hearsay statements of an alleged co-conspirator. He first argued that there was insufficient independent evidence of a conspiracy, but also con-

tended that, even with such evidence, the admission of such testimony under ORS 41.900(6) would unconstitutionally deprive Mr. Farber of his right to confront witnesses. The trial court rejected such argument and admitted hearsay statements of Mr. Whitney, an alleged and indicted co-conspirator, who was unavailable for testimony because he had asserted this Fifth Amendment rights against self-incrimination.

After his conviction, Mr. Farber appealed to the Oregon Court of Appeals, assigning as error the admission of the hearsay statements of Mr. Whitney, on the ground, among others, that the reception of such evidence violated the appellant's Constitutional right to confront witnesses. The Oregon Court of Appeals rendered an initial opinion reversing the appellant's conviction on this Constitutional basis.

However, it then reconsidered such decision and reversed itself, finding that there had been no constitutional violation in the admission of evidence.

The Appellant then raised this same Constitutional question in his Petition for Review before the Oregon Supreme Court. It considered the argument, but found that there had been no Constitutional error, and therefore affirmed the Court of Appeals, and Mr. Farber's conviction.

FACTS.

It is necessary to set forth a fairly complete statement of facts to appropriately frame the question presented by this appeal.

The State's basic theory was that the Appellant was dealing in drugs, supplied by the victim, Harry Foss; became indebted to him for a purchase of cocaine, which was subsequently stolen; and then, fear-

ful of potential collection tactics, hired one Mark Whitney to kill Mr. Foss.

The State's case rested in large part on hearsay statements of Mr. Whitney, requiring proof of a conspiracy before their admission. To prove such conspiracy they elicited testimony showing the following:

In approximately May of 1980 Appellant bought 11 ounces of cocaine from Harry Foss at a price of $1,950. per ounce. Mr. Foss "fronted" the money, in other words, financed the sale and would be paid back after the drugs were subsequently sold. Mr. Farber planned to sell the drugs in small quantities in order to recoup a significant profit. Mark Whitney was going to assist him in the sales, and Appellant initially gave him four of the eleven ounces.

Appellant kept the remaining seven

ounces, storing them in his car while he took a chiropractic exam on June 17th.[3] During the exam, Whitney and Freer, knowing about the drugs, decided to steal them from Farber's vehicle. The two of them, accompanied by Kerry Fouts, broke into the vehicle with a coat hanger and took the drugs and approximately $540. in cash. The Appellant discovered the theft, was immediately upset, and suspected a former girlfriend as the culprit.

Farber discussed the problem with Whitney and also raised the possibility that Foss may have taken the drugs. Whitney saw an opportunity to throw suspicion away from himself and encouraged Farber

[3] Mr. Farber was a student at a local chiropractic college.

that Foss[4] was the likely suspect, and that the debt would have to be paid or Foss "taken care of." The Appellant was unsure of what to do, but Whitney suggested possible murder. Whitney and Farber also discussed that Whitney was to receive some money, but not any specified amount.[5]

After these contacts with Farber, Whitney became nervous that the stolen cocaine would be discovered, and decided

[4] Foss's name was never actually mentioned by Whitney, or known by Freer until after the killing. He was referred to only as Farber's supplier, or his "man."

[5] The Defendant apparently talked to Whitney two or three times in the first week after the drugs were stolen.

to move. He and Freer transported their belongings to the Thunderbird Motel, and then to a trailer court in Heritage Village. The Appellant came to their trailer on a couple of occasions, talked to Whitney, and suggested that he and Freer move to his (Farber's) trailer house in an area known as Beavercreek.[6] About that same time (June 25, 1980) Whitney purchased a 1974 Cadillac from Don Lee Motors, trading in a 1973 Dodge and paying $1,700. in cash.

Whitney and Freer moved immediately to Farber's place at Beavercreek. The house itself is fairly far out in the country and contained a number of firearms, as target shooting is very common in the area. In addition to the guns in the

[6] The trailer was still split in two, and Defendant through the two of them would provide some helpful security.

trailer, the Appellant gave Freer a pistol for such target practice. The Appellant came up the next day to observe some work which was to be done by contractors, but they were unable to proceed because of grade problems at the home site. Farber stayed for awhile doing paper work, and then Whitney went to town to get some groceries. He returned, and Farber left a few minutes later to make a phone call. Soon afterwards, an individual arrived whom Freer later identified as Harry Foss. Foss asked if Curt was there, and they told him the Appellant would probably be back later that evening or the next day. Foss then went in the woods, apparently to urinate. As he walked back toward his car Freer was still unloading the groceries, while Whitney was closer to Foss. Freer heard shots, and looked up to see Foss's body falling to

the ground, and Whitney holding a gun. Whitney then fired a number of additional rounds, and Freer joined in by shooting a few bullets in the direction of the victim's body.

Freer was totally surprised by what happened, and understandingly frightened. He testified that there was never any plan to shoot anyone at the Beavercreek property, or to use the weapons there for anything other than target practice. However, he did say that he and Whitney had agreed to relax at Beavercreek for a few days and then locate Foss in Portland and scare him away or shoot him. Whitney was going to do the shooting while Freer acted as a back up.[7] Whitney apparently had a piece of paper with an address and description

[7] At a prior bail hearing Freer had testified that there had been no plan between he and Whitney to kill Foss.

that corresponded to Foss'.

Freer and Whitney then loaded the body into the trunk of their car, and moved Foss' vehicle out of sight. Farber returned a few minutes later, but neither the body nor the car was visible. He talked briefly with Whitney, who, by Appellant's recollection, told him that he was leaving. Farber was surprised because he throught Freer and Whitney would be staying there awhile.

After talking with Whitney, Farber left. Whitney and Freer later departed, taking Foss' body. They searched for a place to dispose of it, finally putting it in an incinerator at the Alpenrose Dairy.

A short time after disposing of the body, Freer testified that he and Whitney met with Appellant in a Carrows Restaurant in Portland. At that time Whitney told

Farber that they had gotten rid of Foss' body. He recalls Farber responding that he didn't have to think about that any more, or "that's done." Freer left the table for a short time, then returned. The three of them then left the restaurant together, and Farber departed in his own vehicle. Whitney and Freer also drove off, and Freer noticed that Whitney now had a large wad of bills, something he hadn't apparently possessed before. Farber denied that this meeting took place, and said that he was bicycling that day with a friend. His story was confirmed by two other witnesses.[8]

After this evidence was admitted (exclusive of that supplied by the Appellant), the State moved to allow the ad-

[8] Defendant testified that it was a warm day and he got sunburned while cycling. The State sought to rebut such testimony through evidence that the high temperature that day was 72° and there were scattered clouds.

mission of hearsay statements of Whitney under the co-conspirators exception to the hearsay rule. The Court ruled that a prima facie case of conspiracy had been established, and allowed further testimony by Freer and Fouts.

Freer was first recalled and testified that after Whitney and the Appellant had a conversation, Whitney said that he would have his debt cancelled with Farber[9] and receive some additional money if he "took care of the situation" with Foss. After another meeting between Farber and Whitney, Whitney told Freer that the Appellant's supplier was coming back to town. Whitney and Freer then discussed how they would "stake out" Foss's neighborhood, and either scare him away or shoot him. After

[9] Whitney apparently owed Farber approximately $3,000.

the actual shooting, when Whitney talked briefly with Appellant, Freer testified that Whitney said he had told Farber that "his man was taken care of", and that Appellant had said they would meet in town later that week. Whitney later told him that he got money from Farber during the meeting at Carrows.

Kerry Fouts then supplemented her prior testimony by saying that Whitney told her that Farber was going to pay him $14,000. to have "his man" (his drug supplier) killed. Whitney later told her that he had a "contract" from Farber and that he was going to stake out Foss. She also again admitted that all references to killing were made by Whitney, and that the only time Farber had discussed the situation with Foss, he said he didn't

know what to do.[10]

After receiving such evidence, including Whitney's hearsay statements, the jury returned a verdict of guilty.

The matter was then appealed to the Oregon Court of Appeals, which initially reversed the conviction, noting that the hearsay statements of Mr. Whitney had arguably been the only direct evidence of the Appellant's complicity in the conspiracy, and that cross-examination of Whitney could have effectively questioned whether such statements had in fact been made, and whether they were reliable. The court concluded that the hearsay statements lacked "particularized guarantees of trustworthiness", and were so inherently

[10] In fact, Appellant later decided that he, like other students, would sign a note with Foss for the money. He had discussed this with Ms. Lamberti, and also explained the situation to his family.

prejudicial that they should not have been received in evidence in the face of Mr. Farber's objection at trial. The opinion also pointed out that the alleged co-conspirator, Mr. Whitney, had been acquitted in a subsequent trial.

However, the Court of Appeals then reversed itself, ruling that the reliability of the hearsay statements could be inferred from the fact that the co-conspirator exception to the hearsay rule is "firmly established". It also felt that there were other additional "indicia of reliability" which justified admission of the evidence.

The Supreme Court of Oregon then affirmed the second opinion of the Court of Appeals, finding that the evidence was sufficiently reliable, and that it was not necessarily "crucial" to the State nor

"devastating" to the defense.

WHY THE QUESTION PRESENTED IS SUBSTANTIAL

This case presents a Constitutional issue of far-reaching proportions affecting virtually all cases involving the prosecution of co-conspirators. The existing authorities do not adequately deal with the fashion in which an accused's right of confrontation must be weighed against the hearsay exception applied in conspiracy cases.

This court has recognized that any exceptions to the hearsay rule create conflict with the Confrontation Clause, but that the hearsay evidence adduced may nonetheless be admissible in a criminal trial. (See Dutton v. Evans, 400 US 74, 86, 91 S Ct 210, 27 L Ed 2d 213 (1970); California v. Green, 399 US 149, 156, 90 S Ct 1930, 26 L Ed 2d 489 (1970))

The Dutton case specifically dealt with a Constitutional attack on Georgia's co-conspirator statute, an ordinance identical in effect to the Oregon law questioned on this appeal. The plurality opinion in Dutton suggested that in such confrontation/hearsay situations, the courts must resort to a case-by-case analysis to ascertain whether the testimony offered has sufficient indicia of reliability to assure

> ...that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement. (Dutton, supra, at 88-89)

Such criteria for veracity include inquiries into whether:

(1) The statement contained an express assertion of past fact, for if it does not, then such statement is less harmful to the defendant because it carries a built-in warning against giving it undue weight;

(2) The declarant [not the witness] has personal knowledge of the

participants in the alleged conspiracy;

(3) The declarant was relying on faulty recollection;

(4) The general circumstances were such that declarant was unlikely to misrepresent the involvement of the Defendant. (Spontaneous declaration, declaration against penal interest, etc.) (Dutton, supra, at 88-89; United States v. Eaglin, 571 F2d 1069, 1080 (9th Cir, 1977); see also United States v. Kelley, 526 F2d 615, 621 (8th Cir, 1975)

Along with such inquiries of reliability, the court should also consider whether the hearsay evidence offered was "crucial" to the prosecution and/or "devastating" to the defense, (Dutton, supra, at 87; United States v. Snow, 521 F2d 730, 735 (9th Cir, 1973)), and whether there has been an initial showing that the witness is unavailable." (Ohio v. Roberts, 448 US 56, 100 S Ct 2531, 2539, 65 L Ed 2d 597 (1980); Barker v. Page, 390 US 719, 724-725, 88 S Ct 1318, 20 L Ed 2d 255 (1969)) However,

the nature of the Dutton opinion casts significant doubt on its vitality. The plurality opinion of the court was authored by Justice Stewart, and joined in by the Chief Justice, and Justices White and Blackman. However, the opinion's inquiry into whether the evidence was "crucial" or "devastating" seemed to flirt with the general concept of harmless error. In fact, the Chief Justice and Justice Blackman joined in a concurring opinion noting that "(t)he error here, if any exists, is harmless beyond a reasonable doubt." (Dutton, supra, concurring opinion, at 93) Justice Harlan concurred in the result, therefore tipping the scales in favor of the Stewart plurality. However, he did not address the confrontation issue, feeling that the Due Process Clauses of the Fifth and Fourteenth Amendments were better suited for examining the propriety

of evidentiary rules. (Dutton, supra, concurring opinion at 99) Justices Marshall, Black, Douglass and Brennan joined in a dessent and proclaimed that

> (t)he incriminating extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule. (Dutton, supra, dissenting opinion, at 110-111)

It is thus difficult to use Dutton as a firm basis for resolution of the confrontation/hearsay problem.[11]

The task before the lower courts was not simplified by this Court's subsequent decision in Ohio v. Roberts, 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597 (1980).

[11] A four person plurality is not binding precedent. (See Texas v. Brown, ____ US ____, 603 S Ct 1535, 1540, ____ L Ed 2d ___(1983))

Roberts involved the use of a preliminary hearing transcript rather than the witness herself. This Court found that, in such a situation, the evidence admitted was sufficiently reliable because it fell within a "firmly rooted" exception to the hearsay rule. It was not clear whether such a foundation should be determined through a historical or a logical analysis.

At any rate, the Dutton and Roberts decisions have produced inconsistent results in the lower courts. Some federal circuits have held that a statement by a co-conspirator is a "firmly rooted" hearsay exception, and thus no additional proof of trustworthiness is needed. (United States v. Peacock, 654 F2d 339, 349 (5th Cir 1981); United States v. Papia, 560 F2d 827, 835 n. 3 (7th Cir 1977); Ottomano v. United States, 468 F2d 269,

273 (1st Cir 1972) cert den 409 US 1128, 93 S Ct 948, 35 L Ed 2d 260 (1973)) Others have instead utilized the case-by-case analysis as suggested in Dutton. However, they do not require satisfaction of all the criteria in Dutton, nor do they necessarily weigh the impact of the evidence as an independent basis for considering its admissibility. (See United States v. Fleishman, 684 F 2d 1329 (9th Cir, 1982); United States v. Perez, 658 F2d 654 (9th Cir, 1981); US v. Snow, 521 F2d 730, cert den 423 US 1090, 96 S Ct 883, 47 L Ed 2d 101 (9th Cir, 1973); United States v. Menichino, 497 F2d 935 (5th Cir, 1974) Punk v. Huft, 506 F2d 849 (5th Cir, 1975); United States v. Kelley, 526 F2d 615 (8th Cir, 1975))

Therefore, Dutton and Roberts pose rather than decide, the following questions:

1) Is the co-conspirator exception

so "firmly rooted" that its reliability can be inferred?

2) How does a court determine if an exception is "firmly rooted"?

3) If the Dutton test is to be employed, should all the criteria for trustworthiness be satisfied?

4) Is the impact of the evidence ("crucial" to the State, "devastating" to the defendant) a separate factor which should be considered in determining its initial admissibility?

These numerous questions have been left largely unresolved. In addition, the entire propriety of the admissibility of statements of co-conspirators is called into question by the reasoning of Bruton v. United States, 391 US 123, 88 S Ct 1620, 2nd L Ed 2d 476 (1968). Bruton involved the joint trial of co-defendants. The State introduced a non-testifying defendant's confession into evidence. This Court ruled that such admission was error, since the other defendant was denied his right

to confrontation, and the evidence was highly prejudicial. Such prejudicial effect was not cured by the court's instruction that the testimony should only be considered by the jury in determining the guilt of the defendant against whom it was offered.

Thus, we have a situation where a confession, given under circumstances clearly affording it extreme reliability, may not be used in a joint trial because it would be inadmissible hearsay against the other defendant, would violate his right of confrontation, and is highly prejudicial. On the other hand, an admission of such co-defendant, if made in the course of a conspiracy, could be admitted into evidence even though it bears far fewer guarantees of trustworthiness. The only difference is that it falls within a "recognized" hearsay exception, albeit

one which is founded on a legal fiction of implied agency. (See Wigmore on Evidence, Chadbourne Revision, §1077; Davenport, the Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions, a Functional Analysis, 85 Harvard Law Review 1378, 1384-1385 (1972))

CONCLUSION

This case justifies a further inquiry into the Constitutional problems surrounding the co-conspirator exception to the hearsay rule. It is currently unclear how the Courts should analyze this problem, especially the weight that should be given the potential prejudice of the proffered evidence. In addition, the evidence admitted under the co-conspirator rule seems clearly more unreliable than that precluded under Bruton, and is justified only by an illogical hearsay exception based on implied agency. This matter

should be granted full consideration by this Court after briefing on the merits and oral argument.

Respectfully submitted,

BURT, SWANSON, LATHEN, ALEXANDER & McCANN

By: J. MICHAEL ALEXANDER
Of Attorneys for Appellant

September 23, 1983

APPENDIX

OPINION OF THE COURT OF APPEALS

No. 150 March 8, 1982 351

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In Banc*

STATE OF OREGON,
Respondent,
v.
CURTIS L. FARBER,
Appellant.

(No. 80-9-30, CA 19380)

Appeal from Circuit Court, Clackamas, County.

Howard J. Blanding, Judge.

Argued and submitted July 22, 1981; resubmitted in banc January 6, 1982.

J. Michael Alexander, Salem, argued the cause for appellant. With him on the brief was Brown, Burt, Swanson & Lathen, Salem.

Rudolph S. Westerband, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and William F. Gary, Solicitor General, Salem.

VAN HOOMISSEN, J.

Reversed and remanded for a new trial.

THORNTON, J., filed a dissenting opinion.

*Rossman, J., not participating

A-2

VAN HOOMISSEN, J.

Defendant appeals his jury conviction for murder.[1] He contends the trial court erred (1) in admitting the hearsay statements of an alleged co-conspirator and (2) in denying his motion for judgment of acquittal. The dispositive issue is whether the hearsay statements of the alleged co-conspirator were so inherently prejudicial that they should not have been received in evidence, absent an opportunity to cross-examine the declarant.

The state's theory at trial was that defendant was selling cocaine supplied by the victim, Foss. Foss had supplied defendant with a large quantity of cocaine on credit. Defendant's drug sales were aborted when the cocaine and money were stolen from his car. Fearful of the potential repercussions from being unable to pay Foss, defendant hired the alleged co-conspirator, Whitney, to kill Foss. Defendant stipulated that Whitney killed Foss[2] and

[1] ORS 163.115(1) provided in part:

"(1) Except as provided in ORS 163.118 and 163.125, criminal homicide constitutes murder when:

"(a) It is committed intentionally by a person who is not under the influence of an extreme emotional disturbance;

"• • • • •"

Although defendant was charged in the language of a principal, the state's theory was that defendant was liable as an aider and abettor under ORS 161.155, having allegedly hired another to commit the murder. ORS 161.155 provides:

" A person is criminally liable for the conduct of another person constituting a crime if:

"• • • • •

"(2) With the intent to promote or facilitate the commission of the crime he:

"(a) Solicits or commands such other person to commit the crime; or

"(b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or

"• • • •"

[2] Defendant's lawyer explained that defendant did so to minimize the prejudice he thought might come from a jury view and to shorten the trial, thereby reducing the expense of his defense.

We take judicial notice under Oregon Evidence Code, Rule 202, that Whitney was subsequently found not guilty of murdering Foss. *State v. Whitney*, Clackamas County Circuit Court No 80-9-31.

admitted at trial that he had spoken with Whitney about the stolen cocaine and his problem with paying Foss. However, he denied hiring Whitney to kill Foss.

The evidence showed that the killing took place near defendant's house in Beavercreek. Whitney and his accomplice, Freer, had moved to the house with defendant one or two days earlier. On the day of the killing, Whitney went to town to purchase groceries. On his return, defendant left to make a telephone call, there being no phone at the house. Foss arrived while defendant was gone. He asked to see defendant. Whitney told him that defendant was gone and would not be back until later that evening. Foss then went into the nearby woods to urinate. As Foss returned to his car, Whitney began shooting at him. Freer, who was unloading groceries nearby, turned to see Whitney holding a gun and Foss on the ground. Whitney then fired again, and Freer joined in by firing a few shots in the direction of Foss' body. At trial, Freer testified that he and Whitney had no advance plan to shoot Foss at the Beavercreek house, but that they had discussed the possibility of locating Foss in Portland and either scaring or shooting him there.

Shortly after the shooting, defendant returned. He talked briefly with Whitney and then left. Whitney and Freer then covered the body and loaded it into the trunk of Whitney's car. The two spent the next day looking for a place to dispose of the body and finally dumped it in an incinerator at a Portland area dairy. Freer testified that a short time after disposing of the body, he and Whitney met defendant at a restaurant in Portland and that when Whitney told defendant that they had gotten rid of Foss' body, defendant responded, "Good, I don't have to worry about that anymore." Freer left the table for a short time, then returned. As they left the restaurant, Freer noticed that Whitney had a large wad of bills, something Freer said Whitney had not possessed before. Defendant denied that this meeting took place and testified that he was bicycling that day with a friend.

After evidence concerning those events was admitted, the state moved to allow the admission of out-of-court statements allegedly made by Whitney to Freer and

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to Kerry Fouts, a woman who had been living with Whitney and Freer, under the co-conspirator exception to the hearsay rule. ORS 41.900(6) (repealed effective January 1, 1982, by Oregon Laws 1981, ch 892, § 98).[3] Defendant objected on the grounds that (1) Whitney's out-of-court statements were hearsay, (2) a *prima facie* showing of a conspiracy had not been made and therefore the co-conspirator exception to the hearsay rule could not be invoked, and (3) the admission of Whitney's hearsay statements under ORS 41.900(6) violated his confrontation rights guaranteed by the state and federal constitutions.[4]

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[3] Former ORS 41.900(6) provided:

"Evidence may be given of the following facts:

"* * * * *

"(6) After proof of a conspiracy, the declaration or act of a conspirator against his co-conspirator, and relating to the conspiracy.

"* * * * *"

Contrary to the usual rationale that exceptions to the rule against hearsay are based upon reliability, in Oregon the co-conspirator exception is based upon a theory of mutual agency or partnership. *State v. Yee Guck*, 99 Or 231, 241-42, 195 P 363 (1921); *State v. Ryan*, 47 Or 338, 82 P 703 (1905); *State v. Williams*, 38 Or App 327, 590 P2d 259 (1979); *State v. Davis*, 19 Or App 446, 528 P2d 117 (1974).

According to the state's theory of the case, Whitney was defendant's accomplice to murder. ORS 17.250(4) provides:

"That the testimony of an accomplice ought to be viewed with distrust * * *."

Arguably, because accomplice hearsay is declared to be untrustworthy by Oregon law, and because the oral admissions of a party are to be viewed with caution, nothing short of confrontation (which includes testimony under oath subject to both cross-examination and the jury's observation of the witness) with the hearsay declarant could satisfy Article I, Section 11 of our state constitution. *See State v. Smyth*, 286 Or 293, 300 n 8, 593 P2d 1166 (1979).

[4] Article I, Section II of the Oregon Constitution, provides in part:

"In all criminal prosecutions, the accused shall have the right * * * to meet the witnesses face to face * * *."

The Sixth Amendment to the Constitution of the United States provides in part:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

The Sixth Amendment's guarantee of confrontation is binding upon the states. *Pointer v. Texas*, 380 US 400, 85 S Ct 1065, 13 L Ed 2d 923 (1965). For the purposes of this opinion, we assume that the rights guaranteed by the Confrontation Clauses are the same. *See State v. Quinn*, 290 Or 383, 390, 623 P2d 630 (1981); *State v. Florance*, 270 Or 169, 176, 527 P2d 1202 (1974).

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The trial court overruled defendant's objection and allowed further testimony by Freer:

"Q. Did Mark talk about how he was going to kill Skip Foss?

"A. Yes, he did.

"Q. What did he say to you?

"A. Well, he threw out an idea of just going right to his front door and using his pistol at the front door or else from a distance with his rifle.

"Q. Now, after you had been at Mark's — the defendant's trailer at Beaver Creek for a period of time and after Skip had been shot and his body placed in the trunk of the Cadillac, I believe you said that the defendant came out right after that?

"A. That's correct.

"Q. He and Mark I believe you said talked and you couldn't hear what they said?

"A. That's correct.

"Q. Did you talk to Mark later about what he had talked with Skip — with the defendant about?

"A. Yes, I did.

"Q. What did Mark tell you?

"A. He told me that he had told Curt that his man had came up there and that he was taken care of and that Curt had told him he would meet him somewhere in town later in the week. * * *

"Q. Then you got to Carrows and I believe you already described what happened there. As you were leaving Carrows I believe you also described some money that you saw Mark Whitney take out of his pocket and put into his wallet?

"A. Yes.

"Q. Later after you saw that or any time after you saw that, did you talk with Mark about the money?

"A. Yes, I did.

"Q. What did you and he talk about?

"A. Well, he had told me that he had gotten it from Curt and his debt was all cancelled. * * *"

The trial court also permitted the state to recall Fouts as a witness. She then testified:

"Q. * * * Yes. During these conversations did there come a time when Mark told you what the defendant had

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told him and what he had told the defendant, what they had talked about with respect to his man, what they were going to do if anything?

"A. Mark had told me and Kevin both that he was — that Curt was going to pay him $14,000 to have his man killed. To knock him off is how he said it.

"Q. And the $14,000 figure came from Mark?

"A. Yes it did. * * *"

"Q. * * * Did you and Mark have a conversation?

"A. Yeah, we talked for a long time.

"Q. What did Mark tell you?

"A. He told me everything was a go ahead and that he had got the contract from Curt and that they were going to be real busy. And talked about how they were going to stake out Curt's man and stuff like that. * * *"

Whitney's statements were undoubtedly hearsay. But that finding does not end our inquiry. It is well established that some hearsay may be admissible in a criminal case. *See Ohio v. Roberts,* 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597 (1980); *see also State v. Rawls,* 252 Or 556, 451 P2d 127 (1969); *State v. Kendrick,* 239 Or 512, 398 P2d 471 (1965); *State v. Reyes,* 209 Or 595, 308 P2d 182 (1957). The state contends that this hearsay was admissible under ORS 41.900(6). We must, therefore, determine whether the state laid a proper foundation under ORS 41.900(6), *i.e.,* did the state make a *prima facie* case of conspiracy before offering Whitney's hearsay statements.

We agree with the trial court that a *prima facie* showing of defendant's involvement in a conspiracy to kill Foss was made prior to the challenged testimony of Freer and Fouts. Much of the evidence was circumstantial, but the requisite *prima facie* case was shown. *State v. Blackwell,* 241 Or 528, 407 P2d 617 (1965); *State v. Parker,* 225 Or 88, 91-92, 356 P2d 88 (1960); *State v. Ryan,* 47 Or 338, 344, 82 P 703 (1905); *State v. Curran,* 38 Or App 351, 590 P2d 268, *rev den* 286 Or 303 (1979). Therefore, the testimony concerning the out-of-court statements of Whitney was statutorily admissible. ORS 41.900(6); *see State v. Davis,* 19 Or App 446, 449, 528 P2d 117 (1974); *State v. Garrison,* 16 Or App 588, 603, 519 P2d 1295 (1974); *State v. Capitan,* 8 Or App 582, 592, 494 P2d 443 (1972).

Defendant next contends that the admission of Whitney's out-of-court statements violated his confrontation rights. The constitutionality of ORS 41.900(6), as applied in this criminal case, is therefore in issue.

The United States Supreme Court recently considered the relationship between the federal Confrontation Clause and the rule against hearsay in *Ohio v. Roberts, supra.* In *Roberts,* while the Supreme Court rejected the contention that *all* hearsay must be excluded in the face of a confrontation objection, it said:

> "The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the clause] is the right of cross-examination.' In short, the Clause envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'
>
> "These means of testing accuracy are so important that the absence of proper confrontation at trial 'calls into question the ultimate "integrity of the fact-finding process."'" (Footnotes and citations omitted.) 448 US at 63-64.[5]

Roberts instructs that we must first determine whether it is *necessary*[6] to use the proffered hearsay

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[5] The *Roberts* Court also noted:

"The [United States Supreme Court], however, has recognized that competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial. * * * Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence aplicable in criminal proceedings." (Citations omitted.) *Ohio v. Roberts,* 448 US 56, 64, 100 S Ct 2531, 65 L Ed 2d 597 (1980).

[6] In explaining the test of necessity, the *Roberts* Court stated:

"* * * in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." (Citations omitted.) *Ohio v. Roberts, supra,* 448 US at 65.

evidence, and, if so, whether it is "marked with such trustworthiness that 'there is no material departure from the reason of the general rule [against hearsay].' " 448 US at 65; *see also Dutton v. Evans*, 400 US 74, 89, 91 S Ct 210, 27 L Ed 2d 213 (1970). Here, that first question must be resolved in favor of the state. The hearsay declarant was constitutionally unavailable.[7]

Certain hearsay exceptions rest upon such solid foundations that, assuming the unavailability of the declarant, admission of virtually any evidence falling within them comports with the substance of the constitutional right to confrontation. *Ohio v. Roberts, supra*, 448 US at 66. Among those exceptions are dying declarations and previously cross-examined testimony.[8] The co-conspirator exception, however, is not one of those exceptions. In the face of a confrontation objection, therefore, co-conspirator hearsay must be excluded in a criminal case, at least absent a showing of "particularized guarantees of trustworthiness." 448 US at 66.

We take this language from *Roberts* to mean that, because co-conspirator hearsay does not rest upon a solid foundation of reliability, it must not only be shown to be trustworthy in the sense that any hearsay must be shown to be trustworthy, but that it must be shown to have "particularized guarantees of trustworthiness," *i.e.*, it must be exceptionally trustworthy. Any lesser standard would have the practical effect of equating the Confrontation Clause with the rule against hearsay, something the United States Supreme Court has specifically declined to do. *Dutton v. Evans, supra*, 400 US at 86; *California v. Green*, 399 US 149, 155-56, 90 S Ct 1930, 26 L Ed 2d 489 (1970). We therefore examine the evidence here to determine whether Whitney's out-of-court statements meet the second test proscribed in *Roberts, i.e.*, "particularized

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[7] The plurality opinion in *Dutton v. Evans*, 400 US 74, 88 n 19, 91 S Ct 210, 27 L Ed 2d 213 (1970), suggests that a defendant may waive his confrontation rights if he fails to subpoena an available witness. At the time of trial, Whitney was under indictment for the murder of Foss. The case was tried with the understanding that if called as a witness, Whitney would claim his Fifth Amendment rights.

[8] *See, e.g., State v. Rawls*, 252 Or 556, 451 P2d 127 (1969) (previously cross-examined testimony); *State v. Reyes*, 209 Or 595, 308 P2d 182 (1957) (dying declarations); *see also Dutton v. Evans, supra*, 400 US at 80; *Pointer v. Texas, supra*, 380 US at 407.

guarantees of trustworthiness" or exceptional trustworthiness.

According to the state, Whitney, a drug dealer and heavy cocaine user, agreed to help defendant out of a difficult position by killing Foss. The evidence shows, however, that it was Whitney, and his accomplices Freer and Fouts, who had put defendant in that difficult position by stealing a large quantity of cocaine and money from his car. In its brief, the state acknowledges that Whitney had two motives for encouraging defendant to contract for the murder of Foss: (1) to get paid for killing Foss, and (2) to lay blame on Foss for the theft from defendant's car, thereby concealing his own involvement. It is just as reasonable to conclude, however, that Whitney had the *same personal* motives to kill Foss, absent any encouragement from defendant. Confrontation with Whitney would have allowed defendant's attorney to explore Whitney's personal motivation for killing Foss. The possibility that cross-examination of Whitney could have shown the jury that the statements attributed to him had not in fact been made, or, if made, were unreliable was not "wholly unreal." *Dutton v. Evans, supra,* 400 US at 89. In *Pointer v. Texas,* 380 US 400, 404, 85 S Ct 1065, 13 L Ed 2d 923 (1965), the United States Supreme Court said:

> "And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."

Furthermore, while the right to cross-examine an adverse witness is the main and essential purpose of confrontation,[9] a valuable secondary advantage which is implicit in the constitutional guarantee of trial by jury is the opportunity for the jury to weigh the demeanor of the witness.[10] Here the character of Whitney is so demonstrably bad and his motives to fabricate and to have bias

[9] *Davis v. Alaska,* 415 US 308, 316-18, 94 S Ct 1105, 39 L Ed 2d 347 (1971); *Douglas v. Alabama,* 380 US 415, 418, 85 S Ct 1074, 13 L Ed 2d 934 (1965); *Pointer v. Texas, supra* n 4.

[10] The right of confrontation conferred by the Sixth Amendment is a safeguard to ensure the fairness and accuracy of criminal trials and its reach cannot be divorced from the system of trial by jury contemplated by the Constitution. *Parker v. Randolph,* 442 US 62, 73, 99 S Ct 2132, 60 L Ed 2d 713 (1979).

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against defendant are so evident that to permit his statements to go before the jury unchallenged is tantamount to a denial of trial by jury and a denial of due process of law.[11] Confrontation with Whitney would have allowed the jury to observe his demeanor and to judge his credibility. The denial of confrontation here, where the hearsay statements of Whitney were arguably the only *direct* evidence of defendant's involvement in the killing, was devastating to the defense.

The state also acknowledges in its brief that:

> "* * * the evidence demonstrates that Whitney was not only mentally competent, his control and awareness were such that he masterminded the theft of defendant's cocaine, engineered Foss' murder to conceal that fact, and got paid for the killing by defendant."

It cannot be seriously argued that the unsworn statements of an individual so described are "marked with such trustworthiness," *Ohio v. Roberts, supra,* 448 US at 65, that their maker may be permitted to escape the rigors of full

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"The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness." *Barber v. Page,* 390 US 719, 725, 88 S Ct 1318, 20 L Ed 2d 255 (1968).

A primary object of the Confrontation Clause is

"* * * personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattax v. United States,* 156 US 237, 242-43, 15 S Ct 337, 39 L Ed 409 (1895).

See also Davis v. Alaska, supra n 9; *California v. Green,* 399 US 149, 156-58, 90 S Ct 1930, 26 L Ed 2d 489 (1970); *Smith v. Illinois,* 390 US 129, 132, 88 S Ct 748, 19 L Ed 2d 956 (1968); *State v. Smyth, supra* n 3; *State ex rel Gladden v. Lonergan,* 201 Or 163, 173, 269 P2d 491 (1954).

[11] *See Chambers v. Mississippi,* 410 US 284, 93 S Ct 1038, 35 L Ed 2d 297 (1973), where Justice Powell, speaking for eight members of the court, said:

"* * * It is believed that confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest." 410 US at 299-300.

"* * * In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 US at 302; *see also Green v. Georgia,* 442 US 95, 97, 99 S Ct 2150, 60 L Ed 2d 738 (1979).

and complete cross-examination and the scrutiny of a jury when those statements in effect say, "Defendant hired me to kill Foss." Whitney's statements directly implicating defendant in the conspiracy to kill Foss were crucial to the state's case against defendant. Their prejudical effect is obvious. Furthermore, the statements contained expressed assertions about past facts and consequently they carried on their face no warning to the jury against giving them undue weight. *Dutton v. Evans, supra,* 400 US at 88.[12] Lack of cross-examination deprived the jury of a satisfactory basis for evaluating the truth of those statements. *See United States v. Adams,* 446 F2d 681, 683 (9th Cir 1971), *cert denied,* 404 US 943, 92 S Ct 294, 30 L Ed 2d 257 (1971).

In *State v. Capitan, supra,* the co-conspirator's out-of-court statements did not implicate the defendant and therefore "they could not be attributed to an effort 'to shield a more guilty person from the consequences of his own act by shifting the responsibility upon another.' *State v. Aiken,* 41 Or 294, 299, 69 P 683 (1902)." 8 Or App at 593 n 5. Unlike the statement in *Capitan,* however, Whitney's hearsay statements directly implicated defendant in the murder. They therefore *could be* attributed to an effort by Whitney somehow to mitigate the consequences of his own act by shifting primary responsibility for the murder to defendant. Nor was the prejudicial effect of Whitney's assertions rendered less devastating because defendant had ever admitted complicity in the conspiracy. *See Parker v. Randolph,* 442 US 62, 72-73, 99 S Ct 2132, 60 L Ed 2d 713 (1979). He had not. On the contrary, he steadfastly maintained his innocence.

The two in-court witnesses, Freer and Fouts, were equally suspect, although both testified under oath at trial and were subject to cross-examination.[13] Freer, a convicted felon on probation, was Whitney's close friend and willing

[12] In its brief, the state concedes that the declarations in the present case involve express assertions of past facts and "double hearsay," *i.e.,* out-of-court admissions of a defendant repeated by a non-testifying co-conspirator.

[13] The trustworthiness of the testimony of the witness on the stand who is asked to testify to what the declarant said can be tested by cross-examination. The question of credibility is the same whether he is testifying to another's conduct or to another's words. *Sheedy v. Stoll,* 255 Or 594, 596-97, 468 P2d 529 (1970).

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accomplice to murder.[14] A drug dealer and cocaine user, he aided Whitney and Fouts in the theft of cocaine and money from defendant's car. He agreed to testify against defendant as part of his negotiated plea to conspiracy to murder Foss, a Class A felony. ORS 161.450. When he testified against defendant, Freer was awaiting sentencing in Clackamas County on his plea and in Multnomah County for probation violation. He subsequently was placed on probation in connection with his involvement in Foss' Murder.

Fouts also was a convicted felon on probation. A cocaine user, she was an accomplice of Whitney and Freer in the theft from defendant's car. Additionally, she was Whitney's girlfriend. She became frightened after the theft from defendant's car and confided to a girlfriend about the theft. The girlfriend reported this to Whitney. He became upset, choked Fouts, and forced her to move from the house they were sharing. Fouts testified that Whitney told her defendant "was going to pay [Whitney] $14,000 to have [Foss] killed." That is a strange statement in view of the state's contention that defendant had contracted to have Whitney kill Foss because defendant was unable to pay Foss. If defendant could pay Whitney $14,000 to kill Foss, why could not defendant use the same $14,000 to pay Foss? There also was evidence that defendant owned substantial equities in real properties. Why could he not have used those resources to pay Foss? Those are questions defendant's attorney undoubtedly would have asked *Whitney* had Whitney been available for cross-examination. Because he

[14] In his opening statement, the prosecutor told the jury:

"Now, of course, Kevin Freer was involved in this matter from the very beginning, all throughout the case he was involved from the day when he moved in and knew of the defendant, when he moved into the defendant's rental on 67th clear through the time of his arrest in August, late August. He will testify about every single one of the events that he knows about in connection with this case, including the facts that give rise to the conspiracy, what the conspiracy was, where they went, when they went there, exactly what they did, how Curtis Farber or the defendant participated in discussions, how Mark Whitney shot, particular position of Mark Whitney with the gun and Skip Foss as he was shot, how he fell, how many shots were fired, what he did immediately after that, what they did with the body, when they did it with the body, the opportunity to do away with the body at the Alpenrose Dairy, so forth. Then, of course, going to the Swifty Car Wash there by the Alpenrose Dairy and trying to wash away some of the blood out of the car."

was not, the jury had no basis upon which to evaluate the truth of Whitney's alleged statement. Because the testimony of Freer and Fouts concerning Whitney's assertions against defendant showed only that Whitney made the statements, cross-examination of them as to the genuineness of those statements was no satisfactory substitute for cross-examination of Whitney to test the truth of the statements themselves. *See Douglas v. Alabama*, 380 US 415, 419-20, 85 S Ct 1074, 13 L Ed 2d 934 (1965).

The dissent relies upon *State v. Garrison*, 16 Or App 588, 519 P2d 1295 (1974), and *State v. Keller*, 143 Or 589, 21 P2d 807 (1933). We do not find those cases persuasive because they did not involve an objection to the admission of evidence based upon the Confrontation Clause. Both cases apply well-recognized principles to a traditional hearsay objection. We have done the same here, finding that, while Whitney's hearsay statements were admissible under the co-conspirator exception to the rule against hearsay, they were not admissible in the face of defendant's *confrontation* objection.

Recognizing (1) the Confrontation Clause's preference for face-to-face confrontation at trial where the witness is subject to cross-examination and the trier of fact is afforded an opportunity to see and hear the witness testify, (2) that the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party ought to be viewed with caution, ORS 17.250(4), (3) the crucial importance of Whitney's statements to the state's case and their devastating effect on the defense, (4) the character and circumstances of the out-of-court declarant Whitney, whose character, independent personal motives and bias could have been explored during cross-examination, (5) the fact that Whitney's hearsay statements arguably constitute the only *direct* evidence of defendant's complicity in the conspiracy, (6) that the possibility that cross-examination of Whitney could have shown the jury that the statements attributed to him had not in fact been made, or, if made, were unreliable was not "wholly unreal," (7) that Whitney's statements contained expressed assertions about past facts and consequently carried on their face no warning to the jury against giving

them undue weight, (8) that defendant could not subpoena Whitney as a witness, and (9) the character and circumstances of the in-court witnesses Freer and Fouts, we conclude that Whitney's out-of-court statements lacked "particularized guarantees of trustworthiness," *Ohio v. Roberts, supra*, and that they were so inherently prejudicial that they should not have been received in evidence in the face of defendant's confrontation objection. We hold that the denial of defendant's right to cross-examine Whitney to attempt to demonstrate in the presence of the jury his lack of credibility, ORS 44.370,[15] and his bias, *Davis v. Alaska*, 415 US 308, 94 S Ct 1105, 39 L Ed 2d 347 (1974), violated defendant's confrontation rights under the state and federal constitutions.[16] The trial court, therefore, committed reversible error when it allowed that evidence to be heard by the jury.

Because we remand this case for a new trial, it is appropriate to discuss one other issue raised by defendant on appeal: whether the co-conspirator exception to the hearsay rule is applicable when he was not charged with a conspiracy. He argues that the state's case against him was really one for conspiracy and he should have been charged with conspiracy. Instead, he was charged with murder. He acknowledges that the state was not required to charge conspiracy to commit murder. *State v. Gardner*, 225 Or 376, 383-85, 358 P2d 557 (1961); *State v. Weitzel*, 157 Or 334, 60 P2d 958 (1937); *State v. Johnston*, 143 Or 395, 22 P2d 879 (1933). However, he contends that when, as here, the evidence shows a conspiracy, a defendant should be charged

[15] ORS 44.370 provides:

"A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence. Where the trial is by the jury, they are the exclusive judges of his credibility."

[16] *See, e.g., Ohio v. Roberts, supra* n 5; *Green v. Georgia, supra* n 11; *Parker v. Randolph, supra* n 10; *Davis v. Alaska, supra* n 9; *Chambers v. Mississippi, supra* n 11; *Dutton v. Evans, supra* n 7; *California v. Green, supra* n 10; *Roberts v. Russell*, 392 US 293, 88 S Ct 1921, 20 L Ed 2d 1100 (1968); *Bruton v. United States*, 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968); *Barber v. Page, supra* n 10; *Smith v. Illinois, supra* n 10; *Douglas v. Alabama, supra* n 9; *Pointer v. Texas, supra* n 4; *accord, State v. Myers*, 229 Kan 168, 625 P2d 1111 (1981); *Davies v. State*, 95 Nev 553, 598 P2d 636 (1979); *State v. Lunn*, 82 N.M. 526, 484 P2d 368 (1971).

under the specific conspiracy statute, ORS 161.450, a Class A felony, rather than with murder, which carries a mandatory life sentence. We disagree. ORS 161.485[17] is a grant of authority to the state. It permits, but does not require, the state to include multiple counts charging both substantive and inchoate offenses. Defendant was properly charged with murder.[18]

Reversed and remanded for a new trial.

THORNTON, J., dissenting.

The majority accepts defendant's argument that the hearsay testimony concerning defendant's alleged admissions and the admissions of his co-conspirator (Whitney) inculpating defendant were "so inherently prejudicial that they should not have been received in evidence." I disagree. For reasons which follow I believe the trial judge did not err in receiving the challenged testimony.

It seems to me that the majority has in effect nullified a key provision of the Oregon conspiracy statute applicable at that time, former ORS 41.900(6) (repealed effective January 1, 1982). Additionally, the majority is usurping the function of the jury in this case.

Former ORS 41.900(6) provided:

"Evidence may be given of the following facts:

"* * * * *

"After proof of a conspiracy, the declaration or act of a conspirator against his co-conspirator, and relating to the conspiracy.

"* * * * *"

[17] ORS 161.485 provides in part:

"* * * * *

"(3) A person shall not be convicted on the basis of the same course of conduct of both the actual commission of an offense and an attempt to commit that offense or solicitation of that offense or conspiracy to commit that offense.

"(4) Nothing in this section shall be construed to bar inclusion of multiple counts charging violation of the substantive crime and ORS 161.405, 161.435 and 161.450 in a single indictment or information, provided the penal conviction is consistent with subsections (2) and (3) of this section."

[18] Defendant also assigns as error the denial of his motion for acquittal. He argues that, absent the co-conspirator hearsay evidence in this case, there was insufficient evidence of guilt to sustain the verdict. We disagree.

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In my view the challenged testimony comes squarely within the terms of the above provision.[1] *State v. Keller,* 143 Or 589, 21 P2d 807 (1933); *State v. Garrison,* 16 Or App 588, 602, 519 P2d 1295 (1974).

The incriminating statements involved in *Garrison* were quite similar to those in the case at bar. In *Garrison,* defendant and another young man named Deaver strangled the victim and made off with his valuables. There was testimony that after the murder, and during the course of the conspiracy, Deaver gave the victim's watch and belt to a neighbor in his apartment building to conceal; that Deaver told the neighbor that he and the defendant had taken the victim out in the country and strangled him. Deaver repeated this statement to another neighbor later in the evening while they were going downtown with the stolen watch in an effort to raise bail money for defendant. Deaver did not testify. We held that Deaver's statements incriminating defendant were admissible under ORS 41.900(6) and numerous other authorities cited in that opinion, although not made in defendant's presence.

The majority rests its opinion primarily on the federal and state Confrontation Clauses. The United States Supreme Court recently considered the relationship between the federal Confrontation Clause and the rule against hearsay in *Ohio v. Roberts,* 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597 (1980). I cannot agree with the majority's application of the *Roberts* rule. *Roberts* sets out a two-step analysis. First, the *necessity* of the hearsay declaration must be assessed, second, the *reliability* or *trustworthiness* of the declarations must be examined. In the case at hand, the necessity factor was satisfied. The hearsay declarant, Whitney, was unavailable because of his intended Fifth Amendment assertion. As such, the use of the hearsay declarations of Whitney concerning what defendant

[1] The parallel provision of the new Oregon Evidence Code, Rule 801, (4)(b)(E), provides as follows:

"Admission by party-opponent. The statement is offered against a party and is:

* * * * *

"A statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

told him in private, was necessary from an evidentiary point of view. Thus, the record adequately demonstrates the necessity of the statements.[2]

The second factor of *Roberts*, namely reliability or trustworthiness also has been satisfied. Whitney had personal knowledge of the identity and role of participants in the conspiracy. Whitney was present at the shooting itself and was present during the conversations with defendant. Whitney's declarations to Freer and Fouts were made either immediately or shortly after each conversation with defendant. Defendant's assertion that Whitney's ability to recollect was impaired by Whitney's use of cocaine during the critical times ignores the fact that defendant himself testified that he had private conversations with Whitney during this period. Defendant confided in few other persons concerning the lost cocaine and tried to maintain secrecy. Would defendant have confided in someone he felt was so high on drugs that he could not function properly? Obviously not. Furthermore, Whitney's declarations made to different persons at different times were consistent. There is no apparent reason for Whitney to lie about his agreement with defendant. Indeed, his statements to Freer and Fouts concerning his involvement in a conspiracy with defendant were plainly against his penal interest - a universally recognized indicia of reliability.

The statements made by Whitney cited in the majority opinion were not made in some "bargaining process" with the police. The statements made to Fouts were in fact made prior to the killing of Foss. They were not made in an after-the-fact effort to lay blame on another. Additionally, while the credibility of accomplices who testify or provide information to police ought to be viewed with distrust, ORS 17.250(4), the same does not apply to statements made by an accomplice to his friends. Here, Whitney's statements were not made in court or to the police in an effort to mitigate the consequences of his acts. Whatever reasons one might have for lying to police or a jury do not apply to the statements made by Whitney.

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[2] The record is silent as to any misconduct on the part of the prosecutor in the introduction of the hearsay statement. *See State v. Herrera*, 286 Or 349, 594 P2d 823 (1979).

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The majority finds strange the state's theory that defendant would pay $14,000 to kill Foss when he owed Foss only about $20,000. Perhaps that is strange, but it was for the jury to decide. Indeed, defense counsel stressed this apparent incongruity in his argument to the jury.

The two in-court witnesses, Freer and Fouts, who testified concerning Whitney's statements were subject to cross-examination. Whether they were telling the truth or accurately recalling the conversations with Whitney was a question for the jury.

Unlike in many criminal trials, in the present case defendant took the stand and gave his own version of the affair, including his dealings with Whitney. He denied his involvement in a conspiracy and his alleged conversations with Whitney. The jury apparently chose not to believe him.

In the end, the primary concern of our inquiry must be to determine whether the unavailability of Whitney deprived the jury of a satisfactory basis for evaluating the truth of Whitney's declarations. In the present case, I find that the challenged declarations by co-conspirator Whitney relating to the conspiracy possess more than sufficient "indicia of reliability" to satisfy constitutional requirements.

Finally, the majority, it seems to me, ignores or disregards the fact that the trial judge carefully instructed the jury concerning the cautions to be observed in considering testimony regarding defendant's admissions. The text of that instruction is set out in the margin.[3] In

[3] The court instructed the jury:

"Testimony regarding oral statements of the defendant are to be viewed with caution, for the defendant may have been misinformed or may not have clearly expressed the meaning, or the witness may have misunderstood him, or it may be that the witness who testifies to the statements, by intentionally or inadvertently altering a few of the expressions really used, gives an effect to the statement completely at variance with what the defendant actually did say. On the other hand, if you can say from the evidence that the alleged statements were clearly and understandingly made by the defendant, that they are precisely identified, and that the language is correctly remembered and accurately reported by the witness, you are authorized to consider such statements for what you deem them to be worth against the defendant making them. But in reaching such a result you must, for the reasons given, proceed with caution."

addition, defendant took the stand and had full opportunity to deny and/or explain the challenged testimony.

In the final analysis the weight to be given the challenged testimony is peculiarly a question for the jury under proper instructions. The majority's reasons for overturning the verdict really boil down to a jury-type argument to demonstrate why the challenged testimony was untrustworthy. In my judgment an appellate court usurps the function of the jury when it sets aside a verdict in a case of this type on the ground put forward in the majority opinion.

I would affirm.

Richardson, J., joins in this dissenting opinion.

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IN THE COURT OF APPEALS OF THE STATE OF OREGON

In Banc

STATE OF OREGON,
Respondent,
v.
CURTIS L. FARBER,
Appellant.

(No. 80-9-30, CA 19380)

Appeal from Circuit Court, Clackamas County.

Howard J. Blanding, Judge.

On respondent's petition for reconsideration filed April 7, 1982. Former opinion filed March 8, 1982, 56 Or App 351, 642 P2d 668.

Dave Frohnmayer, Attorney General, William F. Gary, Solicitor General, and Thomas H. Denney, Assistant Attorney General, Salem, for petition.

THORNTON, J.

Reconsideration granted; former opinion withdrawn; affirmed and remanded for resentencing.

VAN HOOMISSEN, J., dissenting.

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THORNTON, J.

The state petitions for reconsideration of our former opinion in this case. *State v. Farber,* 56 Or App 351, 642 P2d 668 (1982). We grant the petition and withdraw the former opinion.

In our prior opinion we held that the admission in evidence of certain statements made by an alleged coconspirator was prejudicial error, and we therefore reversed defendant's conviction and remanded the case for a new trial. We now reverse our ruling on that pivotal issue. In order to make our ruling on reconsideration clear, we find it necessary to repeat significant portions of our former opinion.

Defendant appeals his jury conviction for murder[1] for his involvement in the shooting death of Harry Foss, Jr. He assigns as error the admission of certain inculpatory statements concerning him made by an alleged coconspirator. He contends that no conspiracy was established to qualify the hearsay statements under the "coconspirator rule" and that, alternatively, even if there was a conspiracy established, the admission of the inculpatory statements violated his confrontation rights under Article

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[1] ORS 163.115(1) provided in part as follows:

"(1) Except as provided in ORS 163.118 and 163.125, criminal homicide constitutes murder when:

"(a) It is committed intentionally by a person who is not under the influence of an extreme emotional disturbance;

"* * * * * *"

Although defendant was charged in the language of a principal, the state's theory was that defendant was liable as an aider and abetter under ORS 161.155, having allegedly hired another to commit the murder. ORS 161.155 reads as follows:

"A person is criminally liable for the conduct of another person constituting a crime if:

"(1) He is made criminally liable by the statute defining the crime; or

"(2) With the intent to promote or facilitate the commission of the crime he:

"(a) Solicits or commands such other person to commit the crime; or

"(b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or

"(c) Having a legal duty to prevent the commission of the crime, fails to make an effort he is legally required to make."

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I, section 11 of the Oregon Constitution[2] and the Sixth Amendment of the United States Constitution.[3] Defendant also assigns as error the denial of his motion for acquittal. For the following reasons, we now affirm the defendant's conviction but remand for imposition of a new sentence.

The state's theory at trial was that defendant was dealing in cocaine supplied by the victim. Near the time of his death, Foss "fronted" a large quantity of cocaine[4] to defendant for him to sell at a profit and in turn to pay Foss for the cocaine with the proceeds. The drug transaction was aborted when a large portion of the cocaine was stolen from defendant's car. Fearful of the potential repercussions of being unable to pay Foss for the cocaine, defendant arranged with a friend of his, Whitney, to kill Foss.

Defendant stipulated at trial that Foss was shot by Whitney. Defendant admitted that he spoke with Whitney about the stolen cocaine and the problems with Foss, but he denied hiring Whitney to do the killing.

The evidence showed that the killing took place in front of defendant's house in a rural community known as Beavercreek. Whitney and Kevin Freer had moved to the house with defendant one or two days before the shooting, apparently for security reasons. On the day of the shooting, Whitney went to town to purchase some groceries. On his return, defendant left to make a phone call, there being no phone at the Beavercreek residence. Foss arrived while defendant was gone. He asked to see defendant, but Whitney told him that defendant was gone and would not be

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[2] Article I, section 11 of the Oregon Constitution reads in pertinent part:

"In all criminal prosecutions, the accused shall have the right * * * to meet the witnesses face to face * * *."

[3] The Sixth Amendment to the United States Constitution reads in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

The Sixth Amendment's guarantee of confrontation is binding on the states. *Pointer v. Texas*, 380 US 400, 85 S Ct 1065, 13 L Ed 2d 923 (1965). For the purposes of this opinion, we assume that the rights guaranteed by the two Confrontation Clauses are the same. *See State v. Quinn*, 290 Or 383, 390, 623 P2d 630 (1981); *State v. Florance*, 270 Or 169, 176, 527 P2d 1202 (1974).

[4] The transaction involved 11 ounces of cocaine at a value of $1,950 per ounce.

back until later that evening. Foss then went into the nearby woods to urinate. As Foss returned to his car to leave, Whitney began firing at him. Freer, who was still unloading groceries at the time, turned to see Foss on the ground and Whitney holding the gun. Whitney then fired a number of additional rounds with Freer joining in. Freer testified that he and Whitney had no advance plan to shoot Foss at the Beavercreek residence but that he and Whitney had discussed the possibility of locating Foss in Portland and either scaring him or shooting him.

Defendant returned shortly after the shooting, talked briefly with Whitney and then left. Whitney and Freer covered the body and loaded it into the trunk of Whitney's car. The two spent the next day looking for a place to dispose of the body. They finally decided to place it in an incinerator at a local dairy.

Freer testified that a short time after disposing of the body he and Whitney met defendant at a restaurant in Portland. At that time Whitney told defendant that they had got rid of Foss' body. Defendant responded, "Good, I don't have to worry about that anymore." Freer left the table for a short time, then returned. As they left the restaurant, Freer noticed that Whitney had a large wad of bills, something Freer said Whitney had not possessed before. Defendant denied that this meeting took place, and testified that he was bicycling that day with a friend.

After evidence concerning the above events was admitted, the state moved to allow the admission of hearsay statements of Whitney under the co-conspirator exception to the hearsay rule. Over defendant's objection, the court ruled that a *prima facie* case of conspiracy had been established and allowed further testimony by Freer and Kerry Fouts, a 23-year-old woman who was living with Whitney and Freer in defendant's rented home.

Freer was called first and testified in relevant part:

"Q. Did Mark talk about how he was going to kill Skip Foss?

"A. Yes, he did.

"Q. What did he say to you?

"A. Well, he threw out an idea of just going right to his front door and using his pistol at the front door or else from a distance with his rifle.

"Q. Now, after you had been at Mark's — the defendant's trailer at Beaver Creek for a period of time and after Skip had been shot and his body placed in the trunk of the Cadillac, I believe you said that the defendant came out right after that?

"A. That's correct.

"Q. Did you talk to Mark later about what he had talked with Skip — with the defendant about?

"A. Yes, I did.

"Q. What did Mark tell you?

"A. He told me that he had told Curt that his man had came up there and that he was taken care of and that Curt had told him he would meet him somewhere in town later in the week. * * *

"Q. Then you got to Carrows [Restaurant] and I believe you already described what happened there. As you were leaving Carrows I believe you also described some money that you saw Mark Whitney take out of his pocket and put into his wallet?

"A. Yes.

"Q. Later after you saw that or any time after you saw that, did you talk with Mark about the money?

"A. Yes, I did.

"Q. What did you and he talk about?

"A. Well, he had told me that he had gotten it from Curt and his debt was all cancelled. * * *"

Fouts was then recalled to supplement her earlier testimony:

"Q. * * * Yes. During these conversations did there come a time when Mark told you what the defendant had told him and what he had told the defendant, what they had talked about with respect to his man, what they were going to do if anything?

"A. Mark had told me and Kevin both that he was — that Curt was going to pay him $14,000 to have his man killed. To knock him off is how he said it.

"Q. And the $14,000 figure came from Mark?

"A. Yes it did. * * *

"Q. * * * Did you and Mark have a conversation?

"A. Yeah, we talked for a long time.

"Q. What did Mark tell you?

"A. He told me everything was a go ahead and that he had got the contract from Curt and that they were going to be real busy. And talked about how they were going to stake out Curt's man and stuff like that. * * *"

Defendant first argues that the state's case against him was in truth one for conspiracy and that he should have been charged as such. Defendant was instead charged with murder for his involvement. Defendant acknowledges the long-standing rule followed by Oregon that the state is not required to charge conspiracy to commit murder, but may instead charge murder. *State v. Gardner,* 225 Or 376, 383-85, 358 P2d 557 (1961); *State v. Weitzel,* 157 Or 334, 60 P2d 958 (1937); *State v. Johnston,* 143 Or 395, 22 P2d 879 (1933). He argues that, when the facts show a conspiracy, the defendant should be charged under the specific conspiracy statute, a Class A Felony, rather than murder, with its mandatory life sentence. ORS 161.485[5] is a grant of authority to the state. It permits, but does not require, the state to include multiple counts charging both substantive and inchoate offenses. Defendant properly was charged with murder.

Defendant next argues that, even if he was properly charged with murder, the statements of Freer and Fouts should not have been admitted, because they constituted inadmissible hearsay. Defendant maintains that there was insufficient proof of a *prima facie* showing of conspiracy before the statements were allowed.

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[5] ORS 161.485 provides in relevant part:

* * * * * *

"(3) A person shall not be convicted on the basis of the same course of conduct of both the actual commission of an offense and an attempt to commit that offense or solicitation of that offense or conspiracy to commit that offense.

"(4) Nothing in this section shall be construed to bar inclusion of multiple counts charging violation of the substantive crime and ORS 161.405, 161.435 and 161.450 in a single indictment or information, provided the penal conviction is consistent with subsections (2) and (3) of this section."

The long-standing co-conspirator exception to the hearsay rule, codified in former ORS 41.900(6),[6] provides:

> "Evidence may be given of the following facts:
>
> " * * * * *
>
> "(6) After proof of a conspiracy, the declarations or acts of a conspirator against his co-conspirator relating to the conspiracy."

Conspiracies are by their nature usually secret agreements, and the courts have recognized that they must often be proven through circumstancial evidence establishing an "* * * agreement between the parties to effect or accomplish an unlawful purpose." *State v. Ryan,* 47 Or 338, 344, 82 P 703 (1905); *see also State v. Van Nostrand,* 2 Or App 173, 178, 465 P2d 909, *rev den* (1970). Direct proof is often unavailable to show a conspiracy. As the Supreme Court has explained:

> "A conspiracy may be proven by showing the declarations, acts and conduct of the conspirators. It is seldom possible to establish a specific understanding by direct agreement between the parties to effect or accomplish an unlawful purpose. Usually, therefore, the evidence must be necessarily circumstantial in character, and will be sufficient, if it leads to the conviction that such a combination in fact existed. Thus, if it be shown that the conspirators were apparently working to the same purpose,—that is, one performing one part and another another,—each tending to the attainment of the same object, so that in the end there was apparent concert of action, whether they were acting in the immediate presence of each other or not, it would afford proof of a conspiracy to effectuate that object: *Mussel Slough Case* (C.C.) 5 Fed. 680; *United States v. Sacia* (D.C.) 2 Fed. 754. Such proofs would evidence prima facie a conspiracy. * * *" *State v. Ryan, supra,* 47 Or at 344.

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[6] The parallel provision of OEC 801(4)(b)(E), provides as follows:

> "(4) A statement is not hearsay if:
>
> " * * * * *
>
> "(b) The statement is offered against a party and is:
>
> "* * * * *
>
> "(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

Therefore, "[i]t is recognized that the courts have been most liberal in permitting very slight evidence to be sufficient to permit a jury to find a conspiracy." *State v. Parker,* 225 Or 88, 92, 356 P2d 88 (1960).

The proof showed that Foss "fronted" defendant a large quantity of cocaine to be sold. In his dealings in general, Foss implied that he had "Mafia" connections that could be used to collect unpaid debts. Given the loss of most of the cocaine through the theft, the jury could have inferred that defendant had a good motive for ridding himself of Foss. Fouts testified that, upon defendant's discovery of the cocaine theft, he told her that he would have to pay his "man" (Foss) back for the stolen drugs "or else take care of the guy." Fouts also testified that in her presence defendant and Whitney discussed how they might have to "knock him [Foss] off" and that Whitney would be paid for the killing. After the shooting, and after placing the body in the incinerator, Whitney and Freer met defendant at a restaurant. There, upon learning that the body had been taken care of, defendant responded, "Good, I don't have to worry about that anymore." There was testimony that, when entering the restaurant, Freer and Whitney had only enough money for the meal but when leaving, Whitney had a wad of money totalling between $500 and $1,000. From the circumstances of the money's sudden appearance, a rational trier of fact could reasonably conclude that the money was part of a payoff for the killing.

While it is true that much of the above proof was circumstantial, the requisite *"prima facie"* case was shown. *State v. Ryan, supra,* 47 Or at 344; *State v. Van Nostrand, supra.* Therefore, we conclude that the requisite foundation provided in former ORS 41.900(6) was satisfied. *See State v. Davis,* 19 Or App 446, 528 P2d 117 (1974); *State v. Garrison,* 16 Or App 588, 519 P2d 1295 (1974); *State v. Capitan,* 8 Or App 582, 494 P2d 443 (1972).

Whitney was never called as a witness. At the time of defendant's trial, he had not yet gone to trial for his part in the killing and, if called, would have asserted his Fifth Amendment right to remain silent.[7] Defendant argues that

[7] The following discussion took place between defense counsel and the court:

"MR. BURT: This is on the record outside the presence of the jury.

his rights under the Oregon and United States Constitutions to confrontation were violated by admitting the hearsay statements of Whitney when Whitney could not be confronted. Defendant does not expressly argue that former ORS 41.900(6) is unconstitutional but argues that, because Whitney was unavailable, his confrontation rights were violated.

The issue presented requires an examination of the relationship between the Confrontation Clause and otherwise admissible hearsay. Hearsay evidence is excluded because of its untrustworthiness. *Sheedy v. Stall,* 255 Or 594, 596, 468 P2d 529 (1970). The declarant's accuracy and veracity cannot be tested by cross-examination. *Sheedy v. Stall, supra; State v. Kendrick,* 239 Or 512, 515, 398 P2d 471 (1965). Thus, the introduction of hearsay evidence, and the consequent lack of cross-examination, potentially restricts the confrontation rights of a defendant that is the hallmark of the Confrontation Clause. Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harv L Rev 1378 (1972).[8]

"At yesterday's session, Your Honor, we were discussing and I was presenting some — a position with regard to the admission of hearsay evidence under the exception apparently granted by ORS 41.900 Sub 6 as to co-conspirators. Now I don't know that this record has been made clear, but I'm going to say now for the record that I have been told by Mr. Birkland who is the attorney for Mr. Mark —

"THE COURT: Whitney.

"MR. BURT: — Whitney. That if I were to subpoena Mr. Whitney and call him to the stand he would take the Fifth Amendment. Mr. Birkland has told me that he would so testify. And I don't know what he's told Counsel for the State. But in any event, if there's any question about what he has said, I would request permission of the Court to put him on the record under oath. Since he's told me that Mr. Whitney will take the Fifth Amendment, under the case law as I read it it will be unethical for me to call him and to force him to do that in front of the jury.

"THE COURT: Yes.

"MR. BURT: So I'm in a position of not being able to call Mark Whitney as a witness because he has got a perfectly legitimate Fifth Amendment privilege, in my opinion. And if I didn't agree, it wouldn't make any difference. * * *"

[8] In *State v. Weston,* 109 Or 19, 219 P 180 (1923), the prosecutor was allowed to read into evidence a 37-page statement made by an accomplice witness inculpating the defendant. The court found the hearsay narrative to be prejudicial to defendant. The court held:

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In *Dutton v. Evans,* 400 US 74, 91 S Ct 210, 27 L Ed 2d 213 (1970), a cell-mate of a co-conspirator testified about a post-arraignment statement made by the co-conspirator which indirectly suggested that defendant had committed the murder. In dealing with the relationship between the Georgia co-conspirator hearsay exception[9] and the Sixth Amendment, the court acknowledged that the Confrontation Clause does not bar the admission of all hearsay. 400 US at 80. On the other hand, although the hearsay rule and the Confrontation Clause have similar bases, the two do not precisely coincide. 400 US at 82 (quoting *California v. Green,* 399 US 149, 155-56, 90 S Ct 1930, 26 L Ed 2d 489 (1970)). Under *Dutton,* an analysis must be made to determine whether there are sufficient indicia of reliability to permit the introduction of the hearsay declaration in spite of the lack of opportunity for the defendant to cross-examine the declarant. *See United States v. Nick,* 604 F2d 1199 (9th Cir 1979); *United States v. Weiner,* 578 F2d 757 (9th Cir), *cert den* 439 US 981 (1978).[10]

"The statement made and signed by Stilwell was not competent against Weston, except as to the whole of the matter explaining, construing and affecting that part of the subject matter of the writing introduced by defendant.

"A safeguard provided against hearsay evidence, that shelters alike the strong and the weak, the innocent and the guilty, is:

" 'In all criminal prosecutions, the accused shall have the right * * to meet the witnesses face to face * *.' Article I, Section 11, Oregon Const.

" 'The right of confrontation is the right to the opportunity of cross-examination.' 3 Wigmore on Ev. (2 ed.), § 1365.

"We cannot hold the introduction of that hearsay narrative to be legal, because such a holding would ignore our Constitution. We have neither the power nor the inclination to pursue any other course than to uphold our fundamental law." 109 Or at 48-9.

See also State ex rel. Gladden v. Lonergan, 201 Or 163, 269 P2d 491 (1954); *State v. Parker,* 32 Or App 117, 122, 573 P2d 751, *rev den* 282 Or 385 (1978).

[9] The Georgia statute at issue, Ga Code Ann § 38 - 306 (1954), provided:

"After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."

[10] Some federal circuits have adopted the position that a declaration of a co-conspirator admissible under the Federal Evidence Rule, 801(d)(2)(E), *per se* satisfies the requirements of the Confrontation Clause. *See, e.g., United States v. Johnson,* 575 F2d 1347 (5th Cir 1978), *cert den* 440 US 907 (1979); *United States v. Papia,* 560 F2d 827 (7th Cir 1977). Other circuits have adopted a case-by-case

In a recent case not involving the co-conspirator exception, the Supreme Court held challenged hearsay testimony admissible. *Ohio v. Roberts,* 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597 (1980). *Roberts* involved the admissibility of former testimony given at a preliminary hearing. The court adopted a two-part test. First, the necessity of the hearsay declaration must be assessed; second, the reliability of the declaration must be assessed. Here, the necessity factor was satisfied. The use of hearsay was unavoidable because of Whitney's intended Fifth Amendment assertion.

Concerning the second factor in *Roberts,* reliability, the court noted that the Confrontation Clause requires that hearsay testimony must be "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' " 448 US at 65, quoting *Snyder v. Massachusetts,* 291 US 97, 107, 54 S Ct 330, 78 L Ed 674 (1934). It stated that the hearsay must bear adequate "indicia of reliability" but also that:

> "* * * Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 US at 66. (Footnote omitted.)

Here, the second factor of *Roberts* also has been satisfied. We note that the "co-conspirator exception"[11] to the rule against hearsay is firmly established. *See, e.g., State v. Moore,* 32 Or 65, 48 P 468 (1897). Further, there

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approach to the admissibility of evidence under Rule 801(d)(2)(E). *See, e.g., United States v. Puco,* 476 F2d 1099 (2d Cir), *cert den* 414 US 844 (1973); *United States v. Nick,* 604 F2d 1199 (9th Cir 1979).

[11] Under the Oregon Rules of Evidence and the Federal Rules of Evidence, statements made by a co-conspirator are not an "exception to the rule against hearsay. Rather, the statements are not hearsay.

FRE 801(d)(2)(E) provides in relevant part:

"* * * * * *

"(d) Statements which are not hearsay. A statement is not hearsay if —

"* * * * * *

"(2) Admission by party-opponent. The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

See n 6, *supra.*

was additional indicia of reliability. Whitney had personal knowledge of the identity and role of participants in the conspiracy. Whitney was present at the shooting itself and was present during the conversations with defendant. Whitney's declarations to Freer and Fouts were made either immediately or shortly after each conversation with defendant. His declarations made to different persons at different times were consistent. There is no apparent reason for Whitney to lie about his agreement with defendant. Indeed, his statements to Freer and Fouts concerning his involvement in a conspiracy with defendant were plainly against his penal interest.

The statements made by Whitney were not made in a "bargaining process" with the police. The statements made to Fouts in fact were made prior to the killing of Foss. They were not made in an after-the-fact effort to lay blame on another. Additionally, while the credibility of accomplices who testify or provide information to police ought to be viewed with distrust, ORS 17.250(4), the same does not apply to statements made by an accomplice to his friends. Whatever reasons one might have for lying to police or a jury do not apply to the statements made by Whitney.

Unlike in many criminal trials, in the present case defendant took the stand and gave his own version of the affair, including his dealings with Whitney. He denied his involvement in a conspiracy and his alleged conversations with Whitney. The jury apparently chose not to believe him.

In the end, the primary concern of our inquiry must be to determine whether, under the circumstances, the unavailability of Whitney for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of Whitney's declarations. In the present case, we find the challenged testimony possesses sufficient reliability to satisfy constitutional requirements.[12]

[12] It should be noted that the trial court carefully instructed the jury concerning the cautions to be observed in considering testimony regarding defendant's declarations. The court instructed the jury:

"Testimony regarding oral statements of the defendant are to be viewed with caution, for the defendant may have been misinformed or may not have clearly expressed the meaning, or the witness may have misunderstood him,

Defendant also assigns as error the denial of his motion for acquittal. Defendant argues that, absent the co-conspiratory hearsay evidence in this case, there was insufficient evidence of guilt to sustain the verdict. We have already found that this evidence was properly admitted. Viewing the evidence in the light most favorable to the state, there was sufficient evidence to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. *State v. Harris,* 288 Or 703, 609 P2d 798 (1980); *State v. Krummacher,* 269 Or 125, 523 P2d 1009 (1974).

Defendant was sentenced to life imprisonment with a 25-year minimum. We affirm defendant's conviction, but the case must be remanded for resentencing consistent with *State v. Shumway,* 291 Or 153, 630 P2d 796 (1981).

Reconsideration granted; former opinion withdrawn; affirmed and remanded for resentencing.

VAN HOOMISSEN, J., dissenting.

For the reasons stated in our former opinion, *State v. Farber,* 56 Or App 351, 358-65, 642 P2d 668 (1982), I dissent from that portion of the majority opinion that holds that defendant's constitutional right to confront and cross-examine the witness against him was not violated. I would hold that the trial court committed reversible error when it permitted Freer and Fouts to testify about the hearsay statements of Whitney.

The majority states that the co-conspirator exception to the rule against hearsay is "firmly established." It does so in order to bring ORS 41.900(6) within the language found in *Ohio v. Roberts,* 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597 (1980), that reliability can be inferred

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or it may be that the witness who testifies to the statements, by intentionally or inadvertently altering a few of the expressions really used, gives an effect to the statement completely at variance with what the defendant actually did say. On the other hand, if you can say from the evidence that the alleged statements were clearly and understandingly made by the defendant, that they are precisely identified, and that the language is correctly remembered and accurately reported by the witness, you are authorized to consider such statements for what you deem them to be worth against the defendant making them. But in reaching such a result you must, for the reasons given, proceed with caution."

without more in a case where the evidence falls within a "firmly rooted" hearsay exception. 448 US at 66. I take that dictum to mean hearsay exceptions that are firmly rooted *in reliability*. Contrary to the usual rationale that hearsay exceptions are rooted in reliability, in Oregon the co-conspirator exception is rooted in a theory of mutual agency or partnership. *State v. Yee Guck*, 99 Or 231, 241-42, 195 P 363 (1921); *State v. Ryan*, 47 Or 338, 82 P 703 (1905); *State v. Williams*, 38 Or App 327, 590 P2d 259 (1979); *State v. Davis*, 19 Or App 446, 528 P2d 117 (1974).

According to the state, Whitney was defendant's accomplice to murder. ORS 17.250(4) provides that the testimony of an accomplice ought to be viewed with distrust. Arguably, because under Oregon law, accomplice testimony is suspect and because the oral admissions of a party are to be viewed with caution, nothing short of confrontation (which includes sworn testimony subject to cross-examination and the jury's observation of the witness) with Whitney could satisfy Article I, Section 11 of our state constitution. *See State v. Smyth*, 286 Or 293, 300 n 8, 593 P2d 1166 (1979).

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IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent on Review,

v.

CURTIS L. FARBER,
Petitioner on Review.

(TC 80-9-30, CA 19380, SC 29091)

In Banc*

On review from the Court of Appeals.**

Argued and submitted April 8, 1983.

J. Michael Alexander, Salem, argued the cause and filed the brief for petitioner on review. With him on the brief was Brown, Burt, Swanson & Lathen, Salem.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for respondent on review. Dave Frohnmayer, Attorney General, William F. Gary, Solicitor General, and Rudolph S. Weterband, Assistant Attorney General, Salem, filed the brief for respondent on review.

John S. Ransom, Portland, filed an Amicus Curiae brief for ACLU Foundation of Oregon, Inc. With him on the brief was Ransom, Blackman & Simpson, Portland.

CAMPBELL, J.

The decision of the Court of Appeals is affirmed. The defendant's conviction in the trial court is affirmed and the case remanded for resentencing.

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* Jones, J. did not participate in this decision.

** Appeal from Circuit Court, Clackamas County. Howard J. Blanding, Judge. 59 Or App 725, 652 P2d 372 (1982).

CAMPBELL, J.

Defendant appeals his jury conviction for murder. He contends that the trial court erred in admitting statements made by his alleged coconspirator. The claim of error involves questions of the nature of the hearsay testimony, the sufficiency of the evidence establishing the alleged conspiracy and defendant's federal constitutional right of confrontation. The Court of Appeals initially reversed defendant's conviction, but on reconsideration, affirmed the conviction and remanded for resentencing.[1] *State v. Farber*, 59 Or App 725, 652 P2d 372 (1982). We also affirm his conviction.

The state's basic theory of the case is that defendant Curtis Farber owed money to his drug supplier, Harry Foss, Jr. Because someone stole defendant's supply of drugs, he was unable to pay his debt to Foss, so he hired Whitney to kill Foss.

At trial defendant admitted that early in May of 1980 he decided to make some money by selling cocaine. He bought 11 ounces of cocaine from the murder victim, Foss. He agreed to pay $1,950 per ounce for a total price of $21,450. Foss "fronted" these drugs to Farber, which meant that Farber could wait to pay Foss for the drugs until after the drugs were all sold. Defendant planned to sell the cocaine in smaller quantities for profit. He disposed of four ounces of the cocaine. On June 17, 1980, someone stole the remaining seven ounces of cocaine from his car.

Although Farber did not know it, three of his tenants were responsible for the theft. Mark Whitney lived in a house owned by Farber. A young woman named Kerry Fouts and a young man named Kevin Freer lived with him in the house. Farber evidently told Whitney that he expected to get some cocaine from his supplier soon. Whitney was going to help Farber sell some of the cocaine for a share of the profit. Whitney guessed that Farber had the drugs in his car on June 17, 1980, and arranged with Fouts and Freer that the three of them would steal the cocaine, which they did. After the theft, they sold some of the cocaine and consumed the rest.

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[1] Defendant was sentenced to life imprisonment with a 25-year minimum. He must be resentenced consistent with *State v. Shumway*, 291 Or 153, 630 P2d 796 (1981).

Following this theft, Farber came to his tenant and friend Whitney and told him the drugs had been stolen. Farber speculated with Whitney about who might have been responsible for it. Whitney, of course, did not admit that he or his friends were the actual thieves. He suggested to Farber that the supplier might be responsible for the theft. Farber was concerned with the $22,000 debt he owed to the supplier Foss, and the fact that most of the drugs had been stolen. There was testimony that in the past Foss told people that he had "Mafia" connections and could have people "strong-armed" if they did not pay their drug debts. Whitney evidently encouraged Farber to believe that Foss had to be "taken care of." Fouts testified that she heard Farber say he either had to pay Foss or have him killed. She also said she heard a discussion about how much Whitney would receive for killing Foss.

A few days after the theft, Kerry Fouts told a friend that she, Freer and Whitney stole the cocaine. When Whitney heard about this, he threatened Fouts with violence and she moved out of the shared house. Within a few days, Whitney and Freer also moved out. They lived in several different places during the next days. They remained in contact with Farber, who was still concerned about the debt he owed Foss. According to testimony, Farber decided to hire Whitney to "stop" Foss. This was understood to mean either scare him off so he would not demand money from Farber or kill him if this was necessary.

Neither Whitney nor Freer had ever seen Foss or heard his name. Farber only referred to him as "the man" or the supplier. Farber described Foss and the car he drove and gave Whitney his home address. They discussed a possible stake-out.

On June 25, 1980, Whitney and Freer moved to a mobile home owned by Farber. The two halves of the mobile home had not been fastened together yet and Farber was concerned about security. Farber was at the site off and on.

On the morning of June 27, 1980, Whitney and Freer were at the mobile home. Shortly after Farber left, a man arrived at the trailer site. Both the man and the car he was driving matched the descriptions that Farber had given them. The man, Foss, got out of his car and asked where Farber was.

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Whitney shot him several times when he was returning to his car. Freer also shot in Foss' direction.

After this shooting, Whitney and Freer put Foss' body in the trunk of their car. They drove around looking for a place to dispose of Foss' body. On June 29, 1980, they finally got rid of the body in an incinerator at a local dairy. Whitney called Farber and arranged a meeting at a restaurant that same day. Immediately after the meeting with Farber, Freer saw that Whitney had some cash, which he estimated at between $500 and $1,000, which Whitney did not have before the meeting.

Freer pleaded guilty to conspiracy to commit murder and testified at Farber's trial. Whitney pleaded not guilty to a charge of murder. Defendant's counsel told this trial court that Whitney's counsel said Whitney would claim his privilege against self-incrimination and would not testify at Farber's trial.[2]

Farber was charged with murder in violation of ORS 163.115(1).[3] At his trial, he stipulated that Foss was shot and killed by Whitney at the place and time and in the manner that the state claimed. Farber further admitted that he told Whitney about his problems with the stolen cocaine and the debt he owed his supplier, but he denied hiring Whitney to kill

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[2] Whitney was later acquitted following a jury trial.

[3] At the time of the trial, this statute read:

"(1) Except as provided in ORS 163.118 and 163.125, criminal homicide constitutes murder when:

"(a) It is committed intentionally by a person who is not under the influence of an extreme emotional disturbance; * * *"

The state contends Farber is liable for Foss' death as an aider and abettor under ORS 161.155(2):

"A person is criminally liable for the conduct of another person constituting a crime, if:

"(2) With the intent to promote or facilitate the commission of the crime he:

"(a) Solicits or commands such other person to commit the crime; or

"(b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; * * *"

Foss. He testified he was on a bicycle ride all day on June 29, and thus could not have met Whitney and paid him off.

Because of the testimony by Freer and Fouts, the state contended that it had established that a conspiracy existed and moved the court to allow the admission of hearsay statements made by Whitney under the coconspirator exception to the hearsay rule.[4] Over defendant's objections, the court ruled that the state had established a prima facie case of conspiracy and allowed further testimony by both Freer and Fouts concerning statements that Whitney had made. Defendant's brief characterizes this challenged testimony as follows:

> "Freer was first recalled and testified that after Whitney and the Defendant had a conversation, Whitney said that he would have his debt cancelled with Farber and receive some additional money if he 'took care of the situation' with Foss. After another meeting between Farber and Whitney, Whitney told Freer that the Defendant's supplier was coming back to town. Whitney and Freer then discussed how they would 'stake out' Foss' neighborhood, and either scare him away or shoot him. After the actual shooting, when Whitney talked briefly with Defendant, Freer testified that Whitney said he had told Farber that 'his man was taken care of', and that Defendant had said they would meet in town later that week. Whitney later told him that he got money from Farber during the meeting at Carrows." (Footnote omitted.) (Testimony of Mr. Freer, Tr at 919-924, 930-932.
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> "Kerry Fouts then supplemented her prior testimony by saying that Whitney told her that Farber was going to pay him $14,000 to have 'his man' (his drug supplier) killed. Whitney later told her that he had a 'contract' from Farber and that he

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[4] At the time of trial, ORS 41.900(6) provided as follows:

"Evidence may be given of the following facts:

"(6) After proof of a conspiracy, the declaration or act of a conspirator against his coconspirator, and relating to the conspiracy."

The parallel provision of the Oregon Evidence Code 801(4)(b)(E) effective January, 1982 provides as follows:

"(4) Statements which are not hearsay. A statement is not hearsay if:

"(b) Admission by a party-opponent. The statement is offered against a party and is:

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

was going to stake out Foss." (Testimony of Ms. Fouts, Tr at 989-991.)[5]

Defendant's claim of error is based solely on the admission of this evidence. He contends that the trial court should have excluded this evidence on three different bases: (1) the nature of the hearsay testimony; (2) there had been insufficient evidence to establish a conspiracy; and (3) the admission of this evidence was a violation of defendant's constitutional right of confrontation.

THE NATURE OF THE HEARSAY TESTIMONY

The early history of the admission of a coconspirator's statement in view of the rule against the admission of hearsay is unclear, although this exception to the hearsay rule was cited as early as 1794 in the English trial of Thomas Hardy. *Trial of Thomas Hardy*, 24 How St Tr 200, 451-453, 473-477 (1794). The first mention in a United States Supreme Court case was *United States v. Gooding*, 25 US (12 Wheat) 460, 467-468, 6 LEd 693 (1827). The exception has been codified in Oregon law since 1862. Act of October 11, 1862, §696(6).

This exception has been justified on three different grounds: 1) these statements were made by the defendant's agent, and thus should be considered statements of the principal;[6] 2) these statements tend to be inculpatory, and thus are likely to be trustworthy for the same reasons that statements against interest are;[7] and 3) these declarations must be admitted out of necessity because this is an area of law where proof is

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[5] The brief also refers to testimony that Fouts gave on cross-examination. Surely defendant does not contend it was error to admit this testimony. We note that defendant claimed error in the admission of "hearsay statements of Mark Whitney" and did not further specify exactly what testimony is in question beyond these quoted summaries and transcript references. We note that the Rule of Appellate Procedure 7.19(2) requires specificity in the assignment of error. We therefore restrict our review to testimony appearing on the above-mentioned pages of the transcript. We note that some testimony reproduced in the second Court of Appeals opinion, *State v. Farber*, 59 Or App 725, 729-730, actually came from TR 927-928 and apparently was not relied upon by defendant in his assignment of error.

[6] This is the theory by which the earlier cases explained the coconspirator's exception. *See State v. Keller*, 143 Or 589, 599, 21 P2d 807 (1933). The explanation has been criticized. Note, *Developments in the Law of Conspiracy*, 72 Harv L Rev 920, 989 (1959).

[7] Levie, *Hearsay and Conspiracy*, 52 Mich L Rev 1159, 1161 (1954).

difficult.[8] Under both the past and present statute, the reason for the theory supporting the admission of these statements is immaterial.

Defendant's first objection is evidently that ORS 41.900(6) only makes statements admissible as coconspirator's statements if they are "statements having a more significant bases [sic] for reliability." He summarizes some cases that he contends support his proposition that even under this statute only incriminating statements or statements directly relating to the declarant's own actions or observations are admissible. We do not read either the statute nor the cases so narrowly. The above testimony is the sort made admissible under former ORS 41.900(6).

SUFFICIENCY OF THE EVIDENCE TO ESTABLISH A CONSPIRACY

Defendant also contends that the state failed to introduce sufficient evidence to prove a conspiracy in order to provide the proper foundation for the introduction of the coconspirator's statements. We agree with both the trial court and the Court of Appeals that although much of the evidence supporting the state's theory of a conspiracy was circumstantial, it is sufficient to establish a prima facie case of conspiracy[9] and thus provide the necessary foundation for the admission of this evidence. Defendant admitted that he told Whitney that his cocaine had been stolen and he was in trouble with his supplier. He denied hiring Whitney to kill Foss, but Fouts testified that she heard defendant discuss with Whitney that they were either going to have to pay the supplier back or have him killed, and also heard Farber talk about Whitney getting paid for the killing. Defendant stipulated that Whitney killed Foss. Freer testified that after he and Whitney met with Farber to report that they had disposed of Foss' body, Whitney showed him cash totalling between $500 and $1,000 that Whitney did not have when the two men entered the restaurant. This evidence was introduced before the trial court admitted the challenged testimony . From this evidence, a juror might well find

[8] *Id.* at 1166.

[9] Indeed, the evidence to establish a conspiracy is generally circumstantial. *State v. Ryan*, 47 Or 338, 344, 82 P 703 (1905).

that Farber conspired with Whitney to kill Foss, and paid him for the deed. Therefore, Whitney's out-of-court statements were admissible under ORS 41.900(6).

CONFRONTATION CLAUSE

Defendant's final argument is that the admission of Whitney's statements violated his confrontation right under the federal constitution.[10]

The confrontation clause guarantees that a defendant has the right to "confront" the witnesses against him. If "confront" means an actual face-to-face encounter with a right of cross-examination, no hearsay could be allowed in a criminal trial, because hearsay is by definition an out-of-court statement offered in court for the truth of the matter asserted. The main and essential purpose of confrontation is to secure the opportunity of cross-examination in order to test the perception, memory and credibility of the witness. *Davis v. Alaska*, 415 US 308, 315-316, 39 LEd 2d 347, 94 S Ct 1105 (1974). It is clear, however, that some hearsay statements are admissible, even in light of the confrontation clause.

In 1924 the United States Supreme Court without extensive discussion held that the confrontation clause does not prohibit introduction of declaration of a coconspirator who is unavailable at the time of trial. *Delaney v. United States*, 263 US 586, 590, 44 S Ct 206, 68 LEd 462 (1924). In *Pointer v. Texas*, 380 US 400, 403, 85 S Ct 1065, 13 LEd 2d 923 (1965) the court held for the first time that the confrontation clause is applicable to the states through the fourteenth amendment and found the hearsay evidence in question to be inadmissible because of the confrontation clause. Through a series of cases

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[10] United States Constitution, Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." A majority of this court has recently stated that we should first consider constitutional questions under the applicable provisions of the Oregon Constitution. *State v. Caraher*, 293 Or 741, 653 P2d 942 (1982). Here, although the text of the Oregon Constitution differs - "In all criminal prosecutions, the accused shall have the right * * * to meet the witnesses face-to-face * * *" - Oregon Constitution, Article I, section 11 - and although a majority of the court would prefer to decide this case under the Oregon Constitution, the parties have not briefed the question under the Oregon Constitution or pointed out any reason why the result would be different under the Oregon Constitution. *See State v. Herrera*, 286 Or 349, 594 P2d 823 (1979). We therefore decline the invitation to decide this case under the Oregon Constitution.

following *Pointer*, the court found further violations of the confrontation clause by the admission of hearsay. *See, Douglas v. Alabama* (purported accomplice's confession), 380 US 415, 85 S Ct 1074, 13 LEd 2d 934 (1965); *Barber v. Page* (preliminary hearing transcript), 390 US 719, 88 S Ct 1318, 20 LEd 255 (1968); *Bruton v. United States* (confession in a joint trial), 391 US 123, 88 S Ct 1620, 20 LEd 2d 476 (1968).

The issue of the admissibility of a coconspirator's testimony in view of the confrontation clause was directly presented in *Dutton v. Evans*, 400 US 74, 91 S Ct 210, 27 LEd 2d 213 (1970), but unfortunately was not resolved. Justice Stewart, writing for the four person plurality, suggested that this clause does not require cross-examination of declarant where the policies underlying the clause are sufficiently protected, and found them to be so protected in that instance. Justice Harlan, concurring only in the result and writing only for himself, said that hearsay should be judged under a flexible due process requirement of the essentials of a fair trial, rather than under the confrontation clause. Using this approach, he also found the evidence to be admissible. In a separate opinion, Justice Blackmun, joined by Chief Justice Burger, said that any possible error in the admission of this evidence was harmless. Both justices, however, also joined Justice Stewart's opinion. Thus, although the issue was clearly presented, there was no clear resolution of the problem of the interaction of the admissibility of a coconspirator's statement and the confrontation clause.[11]

The Supreme Court's most recent pronouncement in this area is *Ohio v. Roberts*, 448 US 56, 100 S Ct 2531, 65 LEd 2d 597 (1980), involving the use of a preliminary hearing transcript rather than the witness herself at defendant's trial. The court upheld the admission of the testimony, setting forth a two-stage analysis: (1) a finding that the hearsay declarant is unavailable; and (2) a finding that the statements possess "adequate 'indicia of reliability.'" 448 US at 66. The court noted that reliability can be inferred where the evidence falls within a firmly rooted hearsay exception, but in other cases

[11] As Rehnquist, J., notes in *Texas v. Brown*, 51 USLW 4361, 4363 (April 19, 1983), a four-person plurality is not binding precedent.

there must be particularized guarantees of trustworthiness before the evidence can be admitted.

In the present case, defense counsel himself reported to the trial court that Whitney was unavailable to testify, because counsel heard through Whitney's counsel that Whitney was planning to assert his constitutional right against self-incrimination. Under our case law, an actual assertion of this privilege will make the declarant unavailable.[12] *State v. Rawls*, 252 Or 556, 451 P2d 127 (1969). Defense counsel did not call Whitney and make a record of this claim of privilege, stating that he believed it would be unethical to do so in open court. Without deciding whether this is a correct assessment of the situation, we suggest that such a claim of privilege should be made part of the record. This could be done outside the presence of the jury to obviate any possible ethical problems. It has been suggested that the state should immunize a coconspirator, forcing him to testify, so there is no hearsay offered and thus no conflict with the confrontation clause. *See, Dutton v. Evans, supra*, 400 US at 101 n.2 (Marshall, J., dissenting); *United States v. Yates*, 524 F2d 1282, 1286 (DC Cir 1975).

The state was not responsible for Whitney's unavailability, and defendant has never asserted that Whitney was or should have been available during this trial, so we also assume that Whitney was unavailable.

Some circuits have held that a statement by a coconspirator is a firmly rooted hearsay exception, and as such, no proof of further guarantee of trustworthiness is needed. *United States v. Peacock*, 654 F2d 339, 349 (5th Cir 1981); *United States v. Papia*, 560 F2d 827, 836 n. 3 (7th Cir 1977); *Ottomano v. United States*, 468 F2d 269, 273 (1st Cir 1972) *cert den* 409 US 1128, 93 S Ct 948, 35 LEd 2d 260 (1973).

However, most circuits conclude that a case-by-case examination is required to ascertain whether a defendant's right of confrontation is abridged by the admission of this type

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[12] The present statute specifically mentions this instance. OEC 804:

"(1) 'Unavailability as a witness' includes situations in which the declarant:

(a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of a statement."

of hearsay evidence. Generally four reliability factors are considered. As recently stated in *United States v. Fleishman*, 684 F2d 1329, 1339 (9th Cir 1982):

> "The four reliability factors discussed in *Dutton* [400 US at 88-89] and *Perez* [*United States v. Perez*, 658 F2d 654 (9th Cir 1981)] are: (1) whether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime. *Perez*, 658 F.2d at 661. The reliability factors discussed in *Dutton*, however, are not to be considered exhaustive, nor are all factors required to be present in order to admit the declarations. *Id.* An additional factor, sometimes discussed and its relevance debated, is whether the testimony of the coconspirator was 'crucial' or 'devastating.' "

It is important to note that a statement does not need to meet all four factors to be admissible. *Perez, supra*, 658 F2d at 661.

The statements supposedly made by Whitney and repeated by Freer, to which defendant objected, are:

> "He [Whitney] told me [Freer] that by taking care of the situation for Curt [Farber] with Skip [Foss] that that debt would be cancelled and they would get a sum of money.
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> "* * * * *
>
> "Well, he had said that Curt's man was coming back to town and would be looking for him to get the money from him.
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> "* * * * *
>
> "Well, he was supposedly back in town trying to locate Curt and Mark [Whitney] and I talked about after leaving Beaver Creek up there, and going and locating him in town and staking out there to see what type of habits he had.
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> "* * * * *
>
> "He said he was going to have to, you know, try to scare this guy away from Curt or else have to shoot him."

In response to a question about the source of the money Whitney had following the meeting with Farber after the shooting, Freer answered:

"Well, he had told me that he had gotten it from Curt and his debt was all cancelled."

The statements supposedly made by Whitney and repeated by Fouts are as follows:

"Mark had told me and Kevin [Freer] both that he was – that Curt was going to pay him $14,000 to have his man killed. To knock him off is how he said it.

"* * * * *

"He told me that everything was a go ahead and that he had got the contract from Curt and that they were going to be real busy. And talked about how they were going to stake out Curt's man and stuff like that."

The first question to be asked is whether these seven statements are assertions of past fact, for if they are there is a chance that a jury would give them "undue weight." *See Dutton, supra,* 400 US at 88-89. An examination of these statements reveals that only the last statement that Freer repeated, about the source of the money and the cancellation of the debt, is an assertion of past fact; all of the others center on Whitney's plans for the future.

The second factor is whether the declarant had personal knowledge of the identity and role of the participants in the crime. This factor is easily satisfied; Whitney was the declarant and he knew both Farber and Freer well and was aware of the roles they were playing. Defendant could not contend otherwise.

The third factor is the one relied on heavily by defendant: whether it was possible that declarant was relying on faulty recollection. Defendant argues that because Whitney was an admitted drug user, and there was testimony that he used cocaine heavily throughout this conspiracy, his recollection should not be trusted. Even though there was no testimony about the effect of cocaine on a person's memory, the evidence about his drug use might raise valid concerns if Whitney were actually relying on his memory as a basis of making these statements. As discussed above, six of the seven statements objected to are actually statements of future plans, rather than assertions of past facts. The jury was made well aware of

Whitney's drug use, as well as that of Freer and Fouts, and could consider this fact when it weighed the testimony.

The fourth factor of the test is whether the circumstances under which the statements were made provided reason to believe that declarant had misrepresented the defendant's involvement in the crime. All of the statements objected to appear to have been made spontaneously, which give them some initial aura of credibility. In this case, the statements were made by Whitney to people he considered his friends. With the exception of the explanation of the money, the statements were made before the crime was committed. Whitney had no known motive to lie to either of these two people. It is difficult to imagine what advantage Whitney could be seeking by falsely claiming that he was involved in a conspiracy with Farber to commit murder. Most of the statements were against Whitney's penal interest. The statements revealed that Whitney was planning to murder Foss to get money, and have a debt forgiven. This is not the case in which the statements were made in order to gain an advantage, as when a person in custody makes an admission as part of a plea bargain, or makes a statement after a crime is committed to lay the blame on someone else, or at least implicate him. Only the statement concerning the source of the money was made after the crime. Even at that time Whitney did not try to shift any blame for the crime.

A possible final inquiry is whether the evidence offered is "crucial" to the state or "devastating" to the defense. Assuming, without deciding, that this inquiry is an integral part of the constitutional test, we find that this offered evidence is neither crucial or devastating. In fact, most of the statements to which defendant objects are merely cumulative.

In earlier testimony, Freer testified without objection about the following conversation in the restaurant following the murder:

> "Mark told him that we had got rid of the body. And Curt looked at him and just kind of shrugged his shoulders and something to the effect, 'I don't have to think about that anymore,' or 'That's done.' Something like that. Then I excused myself to go to the bathroom. Then when I came back from there they were ready to go. So we went out to the car."

He then described the episode about the money, also without objection:

"[State] Now, about how much money did Mark have when you went to the restaurant?

"[Freer] Not much. Just a little bit over what we needed to pay for our meal.

"* * * * *

"As we were driving away he [Whitney] pulled his wallet out from underneath the arm rest on the seat and placed a wad of money in it.

"* * * * *

"[State] How much?

"[Freer] I believe it was either five hundred or a thousand."

Fouts also testified without objection that Farber had revealed to her plans for the coming murder:

"He [Farber] was going to have to pay him [Foss] the amount of money that the drugs cost that was fronted to him, or else take care of the guy; because they thought – he thought that maybe the guy had fronted it to him and then stole it back from him."

She described another conversation between Whitney and Farber:

"[Fouts] They talked about that they were either going to have to pay the supplier back or have him killed. Knock him off is how they said it.

"[State] Was there – when the defendant was present, let's restrict it to this, again. Was there any further discussion of any kind of plans, preliminary plans for that, any speculation plans that they were engaging in about where or how or what steps were going to be taken or anything like that?

"They just said that they talked about staking out the – their man, the supplier, and watching him to figure out when they would do it, if they did do it."

Fouts further explained:

"Just that they were going to have to stake the house out and that Mark – Mark told – said that he was going to get – talk with Curt about money, about how much he was going to get paid for it.

"They talked about that Mark was going to need money to buy things to take care of him with."

The evidence that defendant objected to did not give much new information to the jury and could not be described as either crucial or devastating. The jury had heard through earlier testimony that defendant and Whitney had discussed plans to kill Foss, and that Whitney would get paid for his part of the plan. It further heard that Whitney had a large amount of unexplained cash following his meeting with defendant after the killing.

Weighing the factors the United States Supreme Court in *Dutton, supra*, 400 US at 88-89, has denominated as significant, we find that the evidence defendant objects to, statements made by a coconspirator, is admissible, even in light of the confrontation clause.

The last matter for our consideration is whether the statements were made during the course and in furtherance of the conspiracy.[13] The statute in force at the time of the trial[14] only requires that a statement relate to the conspiracy, but cases interpreting the statute make it clear that a statement made after the conspiracy ended is inadmissible under this coconspirator's exception. *State v. Hinkle*, 33 Or 93, 97-98, 54 P 155 (1898); *State v. Magone*, 32 Or 206, 209, 51 P 453 (1897). The statement must be in furtherance of the common design. *State v. Boloff*, 138 Or 568, 596, 4 P2d 326, 7 P2d 775 (1932).

There is no problem with the statements Whitney made to Freer, for they are coconspirators and these statements all concerned the conspiracy plan.

The statements made to Fouts and repeated by her present a different problem. There is some authority that statements made to those who are not involved in a conspiracy are not "in furtherance" of it. *United States v. Gibbs*, 703 F2d 683, 690 (3rd Cir 1983). Without so deciding, we hold that even if the statute applicable at this trial would result in these two

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[13] This issue was not raised at trial, nor argued at the Court of Appeals. This court raised the issue sua sponte in letters to the counsels. The counsels responded with oral argument, but without written memoranda.

[14] *See* n. 4, *supra*.

statements being inadmissible because they were not made in furtherance of the conspiracy, any error was harmless. *State v. Van Hooser*, 266 Or 19, 25-26, 511 P2d 359 (1973).

Affirmed and remanded for resentencing.